TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 160

THE MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

HENRY A. GARDNER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

FILED NOVEMBER 21, 1896.

(17,192.)



(17,192.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 607.

THE MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY ET AL., PLAINTIFFS IN ERROR,

vs.

HENRY A. GARDNER.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Minnesota, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Henry A. Gardner, plaintiff, and The Minneapolis & St. Louis Railway Company, William L. Bull, August Belmont, Edwin Hawley, F. B. Olcott, W. A. Read, William Strauss, J. Kennedy Tod, and William D. Washburn, defendants, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendants, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

2

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

3 [Endorsed:] State of Minnesota, supreme court, *ss:* I hereby certify that this writ of error was duly served this 26th day

of October, 1898, and that a true copy thereof was delivered to and lodged with the undersigned clerk of said court on said day. D. F. Reese, clerk of the supreme court of Minnesota, by J. L. Helm, deputy.

4 UNITED STATES OF AMERICA, *ss:*

To Henry A. Gardner, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Minnesota, wherein The Minneapolis & St. Louis Railway Company, William L. Bull, August Belmont, Edwin Hawley, F. B. Olcott, W. A. Read, William Strauss, J. Kennedy Tod, and William D. Washburn are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 21st day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

5 On this 26th day of October, in the year of our Lord one thousand eight hundred and ninety-eight, personally appeared J. J. Harper before me, the subscriber, a deputy clerk of the supreme court, and makes oath that he delivered a true copy of the within citation to F. W. M. Cutcheon, attorney for Henry A. Gardner, defendant in error named in this citation, at St. Paul, Minnesota, on this 26th day of October, 1898.

J. J. HARPER.

Sworn to and subscribed the 26 day of October, A. D. 1898.

[Seal of the Supreme Court, State of Minnesota.]

J. L. HELM,
Deputy Clerk of Supreme Court.

6 To the Honorable Charles M. Start, chief justice of the supreme court of the State of Minnesota:

Now come the Minneapolis and St. Louis Railway Company, William L. Bull, August Belmont, Edwin Hawley, Richard B. Hartshorne, F. P. Olcott, W. A. Read, William Strauss, J. Kennedy Tod, and William D. Washburn, all citizens of the United States of America, by their attorney, Albert E. Clarke, and complain that in the records and proceedings, and also in the rendition of the judg-

ment, in a suit between Henry A. Gardner, plaintiff, and the said Minneapolis and St. Louis Railway Company, William L. Bull, August Belmont, Edwin Hawley, Richard B. Hartshorne, F. P. Olcott, W. A. Read, William Strauss, J. Kennedy Tod, and William D. Washburn, defendants, in the supreme court of the State of Minnesota, that being the highest court of law or equity in said State of Minnesota in which a decision could be had in said suit, and in which a final judgment was rendered against said defendants on the 26th day of August, A. D. 1898, in said suit, wherein it was adjudged that section three (3), article ten (10), of the constitution of the State of Minnesota, which declares that each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him, did not impair the obligation of the charter of said Minneapolis and St. Louis Railway Company and did not impair the contract between the Territory and State of Minnesota, on one part, and said railway company and its stockholders, on the other part, as evidenced by and embodied in the charter of said railway company granted by the Territory of Minnesota by an act of the Legislative Assembly of said Territory of Minnesota approved March 3, 1853 (the same being chapter 66 of the Special Laws of 1853), and the various and several acts of the legislatures of the Territory and State of Minnesota amendatory thereto, including that special act of the legislature of the State of Minnesota approved March 2d, 1881 (being chapter 118 of the Special Laws of 1881), contrary to the special laws, of section ten (10), article one (1), of the Constitution of the United States, which prohibits any State from passing any law impairing the obligations of contracts.

It was also adjudged by said supreme court, by its final
7 judgment in said suit, that said section three (3), article ten (10), of the constitution of the State of Minnesota did not abridge the privileges or immunities of said defendants, nor deny to said defendants the equal protection of the laws, nor deprive said defendants of their property without due compensation or due process of law, contrary to the provisions of the fourteenth (14th) amendment of the Constitution of the United States, all of which appears in the records and pleadings in said suit, whereby manifest error has happened, to the great damage of said defendants.

Wherefore the said defendants pray for the allowance of an writ of error, and for such other process as may cause the same to be corrected by the Supreme Court of the United States.

ALBERT E. CLARKE,

Attorney for Minneapolis & St. Louis Railway Company, William L. Bull, August Belmont, Edwin Hawley, Richard B. Hartshorne, F. P. Olcott, W. A. Read, William Strauss, J. Kennedy Tod, and William D. Washburn, Defendants.

Being of the opinion that no Federal question is presented by the record, I decline to allow the writ.

CHAS. M. START,

Chief Justice of the Supreme Court of the State of Minnesota.

[Endorsed:] Original. State of Minnesota, county of ——, supreme court, — judicial district. Henry A. Gar-ner, plaintiff, *vs.* Minneapolis & St. Louis Railway Company *et al.*, defendant-. Petition for writ of error to sup. ct. of Minn. Due service of the within by copy is hereby admitted at ——, Minnesota, this — day of ——, A. D. 189-. —— ——, attorney for ——; Albert E. Clarke and W. F. Booth, 1104 Guaranty Loan building, Minneapolis, Minn., attorneys for ——.

8 To the honorable Supreme Court of the United States of America:

Now come the Minneapolis and St. Louis Railway Company, William L. Bull, August Belmont, Edwin Hawley, Richard B. Hartshorne, F. B. Olcott, W. A. Read, William Strauss, J. Kennedy Tod, and William D. Washburn, all citizens of the United States of America, by their attorney, Albert E. Clarke, and complain that in the records and proceedings, and also in the rendition of the judgment, in a suit between Henry A. Gardner, plaintiff, and the said Minneapolis and St. Louis Railway Company, William L. Bull, August Belmont, Edwin Hawley, Richard B. Hartshorne, F. B. Olcott, W. A. Read, William Strauss, J. Kennedy Tod, and William D. Washburn, defendants, in the supreme court of the State of Minnesota, that being the highest court of law or equity in said State of Minnesota in which a decision could be had in said suit, and in which a final judgment was rendered against said defendants on the 26th day of August, A. D. 1898, in said suit, wherein it was adjudged that section three (3) of article ten (10) of the constitution of the State of Minnesota, which declares that each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him, did not impair the obligation of the charter of said Minneapolis and St. Louis Railway Company, and did not impair the contract between the Territory and State of Minnesota, on one part, and said railway company and its stockholders, on the other part, as evidenced by and embodied in the charter of said railway company granted by the Territory of Minnesota by an act of the Legislative Assembly of said Territory of Minnesota approved March 3, 1853 (the same being chapter 66 of the Special Laws of 1853), and the various and several acts of the legislature of the Territory and State of Minnesota amendatory thereto, including that special act of the legistature of the State of Minnesota approved March 2d, 1881 (being chapter 113 of the Special Laws of 1881), contrary to the special laws, of section ten (10), article — (1), of the Constitution of the United States, which prohibits any State from passing any law impairing the obligations of contracts.

It was also adjudged by said supreme court, by its final judgment in said suit, that said section three (3), article ten (10), of the
9 constitution of the State of Minnesota did not abridge the privileges or immunities of said defendants, nor deny to said defendants the equal protection of the laws, nor deprive said de-

fendants of their property without due compensation or due process of law, contrary to the provisions of the fourteenth (14th) amendment of the Constitution of the United States, all of which appears in the records and pleadings in said suit, whereby manifest error has happened, to the great damage of said defendants.

The supreme court of the State of Minnesota and its chief justice, the Honorable Charles M. Start, refused to allow a writ of error, said court and said chief justice being of the opinion that no Federal question is presented by the record.

Wherefore the said defendants pray for the allowance of a writ of error, and for such other process as may cause the same to be corrected by the Supreme Court of the United States.

ALBERT E. CLARKE,
Attorney for Minneapolis & St. Louis Railway Company, William L. Bull, August Belmont, Edwin Hawley, Richard B. Hartshorne, F. B. Olcott, W. A. Read, William Strauss, J. Kennedy Tod, and William D. Washburn, Defendants.

WILLIAM STRAUSS,
DUDLEY & MICHENER,
Of Counsel.

10 DISTRICT OF COLUMBIA, *ss:*

William Strauss, of lawful age, being duly sworn according to law, deposes and says that he is one of the defendants in the case described in the foregoing petition or application, which he has read and understands, and that the matters of fact therein set forth are true, as he is informed and believes.

WILLIAM STRAUSS.

Subscribed and sworn to before me, a notary public in and for the District aforesaid, on this twelfth day of October, A. D. 1898.

[Seal of L. P. Squier, Notary Public, District of Columbia.]

L. P. SQUIER,
Notary Public.

11 [Endorsed:] In the Supreme Court of United States of America. Henry A. Gardner, plaintiff, *vs.* Minneapolis and St. Louis Railway Company *et al.*, defendants. Petition for writ of error. Oct. 14th, '98 Let writ issue. D. J. Brewer, justice.

12 *Assignment of Errors Made and Filed by Defendant and Appellant in the State Supreme Court.*

I. The court erred in holding that the defendant railway company was not created and organized under and by chapter 66, Laws of 1853, Territory of Minnesota.

II. The court erred in holding that the rights, franchises, privileges, and immunities granted by chapter 66, Laws of 1853, Terri-

tory of Minnesota, to the Minnesota Western Railroad Company did not vest prior to the adoption of the State constitution of the State of Minnesota.

III. The court erred in holding that the charter of the Minnesota Western Railroad Company, afterward called the Minneapolis & St. Louis Railway Company, was ever amended so as to impose a double liability on the stockholders of said company, either by constitutional enactment or ancilliary legislation, during the period throughout which said charter was subject to amendment.

IV. The court erred in holding that the double liability ever attached to the stock of any one of the four corporations which entered into the consolidation agreement of 1881.

V. The court erred in holding that section 3, article 10, of the State constitution, which imposes a double liability on the stockholders of corporations other than manufacturing and mechanical corporations, applies to corporations created before the adoption of said constitution.

VI. The court erred in holding that section 3, article 10, State constitution, imposing a double liability on the stockholders of corporations other than manufacturing and mechanical corporations, ever applied to the Minnesota Western Railroad Company, or to the defendant railway company, or to the Minneapolis & Duluth Railroad Company.

VII. The court erred in holding that section 3, article 10, of the State constitution, if applied to the defendant railway company, did not violate section 10, article 1, of the Constitution of the United States, in that the provisions of said section 3, article 10, impaired the obligation of the charter contract contained in said chap-
13 ter 66, Laws of 1853, Territory of Minnesota.

VIII. The court erred in holding that section 3, article 10, of the State constitution, if applied to the defendant railway company, is not in violation of the 14th amendment of the Constitution of the United States, in that the State of Minnesota, by and through the provisions of said section 3, article 10, assumed to impair and destroy rights theretofore vested in said defendants.

IX. The court erred in holding that section 3, article 10, of the State constitution, if applied to the defendant railway company, is not in violation of the 14th amendment to the Constitution of the United States, in that the State of Minnesota, by and through the provisions of said section 3, article 10, assumes to abridge the privileges and immunities of the defendants as citizens and to deny to defendants the equal protection of the laws, and to deprive them of their property without due compensation or due process of law.

X. The court erred in holding that it was the intent of the framers of the State constitution or of the people in adopting said constitution that said section 3, article 10, should apply to corporations already created, organized, and existing at the time of the adoption of the State constitution.

XI. The court erred in holding that the defendant railway company was not created, organized, and existing until the passage of chapter 113, Special Laws 1881, of the State of Minnesota.

XII. The court erred in holding that the legislature intended by the passage of chapter 113, Special Laws 1881, of the State of Minnesota, to create a new corporation, and that said chapter 113, Special Laws 1881, did in fact create a new corporation.

XIII. The court erred in holding that by the passage of chapter 113, Special Laws 1881, the legislature intended to abridge or modify or repeal, and that said law did in fact abridge, modify, or repeal, any of the rights, privileges, or immunities theretofore possessed by the corporation theretofore known as the Minneapolis & St. Louis Railway Company.

XIV. The court erred in holding that if, under chapter 113, Special Laws of 1881, there was in fact created a new corporate entity, such new corporate entity did not possess all the rights, privileges, and immunities, including exemption from double liability upon its stock, originally possessed by the corporation created under chapter 66, Laws of 1853, Territory of Minnesota, and also possessed by the other corporations entering into said consolidation agreement.

14

STATE OF MINNESOTA, *Supreme Court,* } ss:

I, D. F. Reese, clerk of the supreme court of the State of Minnesota, do hereby certify that the above and foregoing assignment of errors was made and filed by the defendants and appellants in the above-entitled action of Henry A. Gardner, respondent, *vs.* Minneapolis and St. Louis Railway Company, William L. Bull, August Belmont, Edwin Hawley, Frederick B. Olcott, Richard B. Hartshorne, W. A. Read, William Strauss, J. Kennedy Tod, and William D. Washburn, appellants. Said assignment of errors was filed in said supreme court on the 11th day of June, 1898, in accordance with the rules and practice of said court, and became and constituted a part of the record upon which said cause was heard, tried, and determined, and upon which the same was argued and submitted in said court.

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of the State of Minnesota, at the capital, St. Paul, Minnesota, this 18th day of November, 1898.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE,
Clerk of the Supreme Court of Minnesota,
By J. L. HELM, *Deputy.*

[Endorsed:] 11199. State of Minnesota, county of ——. Supreme court, — judicial district. Henry A. Gardner, respondent, *vs.* Mpls. & St. Louis Railway Co. *et al.*, appellants. Assignment of errors.

Endorsed: "Filed Nov. 18, 1898. D. F. Reese, clerk."

15 In the Supreme Court of the United States.

MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY, WILLIAM L. Bull, August Belmont, Edwin Hawley, Richard B. Hartshorne, F. P. Olcott, W. A. Read, William Strauss, J. Kennedy Tod, and William D. Washburn, Plaintiffs in Error,

vs.

HENRY A. GARDNER, Defendant in Error.

Assignment of Errors.

The plaintiffs in error respectfully submit that the supreme court of Minnesota erred in this:

I.

The court erred in holding that section 3 of article 10 of the constitution of the State of Minnesota, which provides that "each stockholder in any corporation (except those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him," is valid, and imposes a personal liability for corporate debts upon the individual plaintiffs in error as stockholders of the corporation plaintiff in error, and that such constitutional provision does not impair the obligation of the contract between the State of Minnesota and the plaintiffs in error embodied in and evidenced by the special act of the Legislative Assembly of the Territory of Minnesota approved March 3d, 1853, entitled "An act to incorporate the Minnesota Western Railroad Company," the benefits of which act were vested, continued, and perpetuated in the plaintiffs in error by the special act of the legislature of the State of Minnesota approved March 2d, 1881, entitled "An act to amend an act entitled An act to amend an act entitled 'An act to incorporate the Minnesota Western Railroad Company,' approved March 3d, 1853, and the acts amendatory thereof, approved February 4th, 1870," and is not in conflict
16 with the provisions of section 10, article 1, of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts.

II.

The court erred in holding that section 3 of article 10 of the constitution of the State of Minnesota is not violative of the 14th amendment to the Constitution of the United States, in that the State of Minnesota by the provisions of said section 3 assumes to impair and destroy rights vested in the plaintiffs in error by the special act of the Legislative Assembly of the Territory of Minnesota approved March 3d, 1853, entitled "An act to incorporate the Minnesota Western Railroad Company," and by the special act of the legislature of the State of Minnesota approved March 2d, 1881, entitled "An act to amend an act entitled An act to amend an act entitled 'An act to incorporate the Minnesota Western Railroad Company,' approved March 3d, 1853, and the act amendatory thereof, approved February 4th, 1870."

III.

The court erred in holding that the enforcement against the plaintiffs in error of the provisions of section 3, article 10, of the constitution of the State of Minnesota, which declares that each stockholder in any corporation shall be liable to the amount of stock held or owned by him, is not in violation of section 10, article 1, of the Constitution of the United States, in that it impairs the obligation of the contract between the State and the plaintiffs in error, which is embodied in and evidenced by the act of the legislature of the State of Minnesota approved March 2d, 1881, the same being and constituting chapter 113 of the Special Laws of Minnesota enacted in the year 1881.

IV.

The court erred in holding that the contract of consolidation between the Minneapolis and St. Louis Railway Company, the Minnesota and Iowa Southern Railroad Company, the Minneapolis & Duluth Railroad Company, and Fort Dodge & Fort Ridgely Railroad Company, pursuant to chapter 113 of the Special Laws of 1881, approved March 2d, 1881, created a new corporation.

[Endorsed:] In the United States Supreme Court. Minneapolis & St. Louis Railway Co., pl'ffs in error, *vs.* Henry A. Gardner, def't in error. Assignment of errors. Albert E. Clarke, counsel for pl'ffs in error, Minneapolis, Minnesota.
Endorsed: "Filed Nov. 18, 1898. D. F. Reese, clerk."

17 In the Supreme Court of the United States.

HENRY A. GARDNER, Plaintiff,
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, WILLIAM L. BULL, August Belmont, Edwin Hawley, Richard B. Hartshorne, F. B. Olcott, W. A. Read, William Strauss, J. Kennedy Tod, and William D. Washburn, Defendants.

Know all men by these presents that we, The Minneapolis and St. Louis Railway Company, William L. Bull, August Belmont, Edwin Hawley, Richard B. Hartshorne, F. B. Olcott, W. A. Read, William Strauss, J. Kennedy Tod, and William D. Washburn, as principals, and National Surety Company, a New York corporation, as surety, are held and firmly bound unto Henry A. Gardner in the full and just sum of twenty thousand dollars ($20,000), to be paid to said Henry A. Gardner, his executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of October, A. D. 1898.

Whereas lately, at a session of the supreme court of the State of Minnesota, in a suit pending in said court between said Henry A. Gardner, plaintiff, and said Minneapolis & St. Louis Railway Com-

pany, William L. Bull, August Belmont, Edwin Hawley, Richard B. Hartshorne, F. B. Olcott, W. A. Read, William Strauss, J. Kennedy Tod, and William D. Washburn, as defendants, a final judgment was rendered against the said defendants, and the said defendants having obtained a writ of error from the Supreme Court of the United States and filed a copy thereof in the clerk's office of said court to reverse said judgment in the aforesaid suit, and a citation to said Henry A. Gardner, citing and admonishing him to be and appear before the Supreme Court of the United States, to be holden at Washington, on the 21st day of November, 1898:

Now, the condition of the above obligation is such that if
18 the said Minneapolis and St. Louis Railway Company, William L. Bull, August Belmont, Edwin Hawley, Richard B. Hartshorne, F. B. Olcott, W. A. Read, William Strauss, J. Kennedy Tod, and William D. Washburn shall prosecute said writ of error to effect and answer all costs and damages and fully pay to said Henry A. Gardner, his heirs, executors, or administrators, the full amount of said judgment of said supreme court of the State of Minnesota if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect.

MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY,
WILLIAM L. BULL,
AUGUST BELMONT,
EDWIN HAWLEY,
RICHARD B. HARTSHORNE,
F. B. OLCOTT,
W. A. READ,
WILLIAM STRAUSS,
J. KENNEDY TOD,
WILLIAM D. WASHBURN,
By ALBERT E. CLARKE, *Their Attorney.*
NATIONAL SURETY COMPANY,
By MAURICE AUERBACH, *Resident Vice-President.*

Attest:
[SEAL.] W. B. JOYCE,
Resident Ass't Secretary.

Signed, sealed, and delivered in presence of—
J. J. HARPER.
W. H. WILSON,
L. F. HOLCOMB.

Approved Oct. 21, 1898.
D. J. BREWER,
Associate Justice Sup. Ct. U. S.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

On this 18th day of Oct., 1898, before me personally appeared William B. Joyce, resident assistant secretary of the National Surety

Company, the above-named corporation, with whom I am personally acquainted, who, being by me duly sworn, said that he resides in the city of St. Paul; that he is resident assistant secretary of said corporation, the National Surety Company; that he knows the corporate seal of said corporation; that the seal affixed to the foregoing instrument is the corporate seal, that it was affixed by order of the board of directors of said corporation, and that he signed said instrument as resident assistant secretary of said corporation by like authority; and the said William B. Joyce further said that he is acquainted with Maurice Auerbach and knows him to be resident vice-president of said company; that the signature of said Maurice Auerbach subscribed to the said instrument is the genuine handwriting of the said Maurice Auerbach, and was thereto subscribed by the like order of the said board of directors and in the presence of him, the said William B. Joyce, resident assistant secretary, and the said William B. Joyce acknowledged said instrument to be the free act and deed of said corporation.

[SEAL.] L. F. HOLCOMBE,
Notary Public, Ramsey County, Minnesota.

19 It is hereby stipulated that the above and foregoing bond is in all matters and things sufficient, and is hereby accepted, and the same may be approved.

F. W. M. CUTCHEON,
Attorney for Henry A. Gardner, Plaintiff.
ALBERT E. CLARKE,
Attorney for Foregoing Defendants.

[Endorsed:] In the Supreme Court of the United States. Henry A. Gardner, pl'ff, *vs.* Minneapolis & St. Louis Railway Co. *et al.*, def't-. Bond. Due service of this bond by copy thereof is hereby admitted this 26th day of October, 1898. F. W. M. Cutcheon, att'y for defendant in error.

Endorsed: "Filed Nov. 18, 1898. D. F. Reese, clerk."

20 In the Supreme Court of the United States.

MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY, WILLIAM L. Bull, August Belmont, Edwin Hawley, Richard B. Hartshorne, F. P. Olcott, W. A. Read, William Strauss, J. Kennedy Tod, and William D. Washburn, Plaintiffs in Error,

vs.

HENRY A. GARDNER, Defendant in Error.

The clerk will enter my appearance as counsel for the plaintiffs in error.

ALBERT E. CLARKE,
Minneapolis, Minn., 1104 *Guaranty Loan Bldg.*

[Endorsed:] In the Supreme Court of the United States. Minneapolis & St. Louis Railway Company *et al.*, pl'ffs in error, *vs.* Henry

A. Gardner, def't in error. Precipe. Albert E. Clarke, counsel for pl'ffs in error, Minneapolis, Minn.
Endorsed: "Filed Nov. 18, 1898. D. F. Reese, clerk."

21 & 22 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898.

STATE OF MINNESOTA, } ss:
County of Hennepin, }

District Court, Fourth Judicial District.

HENRY A. GARDNER, Plaintiff,
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, WILLIAM L. BULL, August Belmont, Edwin Hawley, Richard B. Hartshorne, F. B. Olcott, W. A. Read, William Strauss, J. Kennedy Tod, and William D. Washburn, Defendants.

Amended Complaint.

Now comes Henry A. Gardner, plaintiff above named, upon his own behalf, and upon behalf of all others in interest with him who shall become parties to this action, for this, his complaint, respectfully shows to this court and alleges:

I.

23 That the defendant, The Minneapolis & St. Louis Railway Company, is a domestic railroad corporation, located within this State; that during the year 1853, by an act of the legislature of the Territory of Minnesota, approved March 3, 1853, entitled "An act to incorporate the Minnesota Western Railroad Company," there was incorporated the Minnesota Western Railroad Company, which continued to exist and be known by said name until on or about the 26th day of May, A. D. 1870, on which day its board of directors by resolution duly adopted, and proceeding under the authority conferred by an act approved February 4th, 1870, amendatory of said original act, and entitled "An act to amend an act to incorporate the Minnesota Western Railroad Company," lawfully changed the name of said corporation to the Minneapolis & St. Louis Railway Company, by which name it was thereafter lawfully and commonly known; that on or about the 20th day of April, 1881, said corporation, proceeding under and in accordance with the provisions of another act of the legislature of the State of Minnesota, approved March 2, 1881, and entitled "An act to amend an act entitled 'An act to incorporate the Minnesota Western Railroad Company,' approved March third (3rd), one thousand eight hundred and fifty-three (1853), and the act amendatory thereof, approved February fourth (4th), one thousand eight hundred and seventy (1870)," did duly enter into an agreement with certain other corporations, to wit: the Minneapolis & Duluth Railroad

Company, the Minnesota & Iowa Southern Railroad Company, and the Fort Dodge & Fort Ridgley Railroad Company, by and under the terms of which all said corporations above mentioned
24 agreed to make a full and complete consolidation and amalgamation of all said corporations and their respective stocks, franchises, property, earnings and management, under the name of the Minneapolis & St. Louis Railway Company, which said agreement was to and did take effect June 1, 1881; that thereafter said companies filed their said articles of consolidation as provided by said act of the legislature of Minnesota of March 2, 1881, and by the laws of the State of Iowa, a copy of which said agreement and articles of consolidation is hereto attached, marked Exhibit "A" and made a part hereof; that thereafter, and on or about June 1, 1881, said consolidation was duly consummated, each of said constituent companies conveying and transferring unto said consolidated corporation all their respective stocks, franchises, rights, property and earnings; that thereafter said consolidated company entered upon, and ever after and until the 2d day of November, 1894, enjoyed all the franchises, rights, property and earnings of its said constituent corporations; that said consolidated corporation is the defendant corporation, The Minneapolis & St. Louis Railway Company above named.

II.

That said defendant corporation, The Minneapolis & St. Louis Railway Company, was invested by said acts above mentioned and the laws and statutes of said Territory and State of Minnesota, with the usual and general powers of a body corporate, and especially was empowered to construct, maintain, and operate a rail-
25 road with a single or double track from Stillwater, on Lake St. Croix, to the city of St. Anthony, on the Mississippi river, both in Minnesota, and thence across said river to the city of Minneapolis, in said State, to a convenient point of junction with the Mississippi Valley railroad or the Hastings & Dakota railroad, or both, besides eight branches.

III.

That said Minneapolis & St. Louis Railway Company did not, either under that name or its original name, to wit: the Minnesota Western Railroad Company, enter upon the prosecution of its corporate enterprise, either by constructing any railroad or by receiving subscriptions to its capital stock, or in any other way, until after the 6th day of March, 1869, but that on and prior to the 28th day of June, A. D. 1888, said defendant, The Minneapolis & St. Louis Railway Company, owned and operated a system of railroads in the States of Minnesota and Iowa, extending from Minneapolis through Hopkins, Merriam junction and Albert Lea, Minnesota, and Fort Dodge, Iowa, to Angus in the State of Iowa, with a branch line from Hopkins, via Winthrop, Minnesota, to Morton, in said last-named State; that said railway company also owned a line of railway extending from Minneapolis to White Bear, in the State of Minnesota

which was leased to and operated by the St. Paul & Duluth Railroad Company.

IV.

26 That on said day last mentioned, said defendant railway company had executed or assumed nine (9) mortgages, securing bonds theretofore issued and varying in amount, which said mortgages were liens upon different portions of said lines of railway, and were as follows:

1. A mortgage executed by the Minneapolis & Duluth Railroad Company to the Fidelity Insurance, Trust and Safe Deposit Company, of Philadelphia, Pennsylvania, dated January 1st, 1877, securing outstanding bonds of the aggregate par value of two hundred and eighty thousand dollars ($280,000), together with interest thereon at the rate of seven (7) per cent. per annum, which said mortgage was and still is a lien upon that portion of the railway of said defendant railway company extending from Minneapolis to White Bear, in the State of Minnesota.

2. A mortgage executed by the Minneapolis & St. Louis Railway Company to said Fidelity Insurance, Trust and Safe Deposit Company, dated January 1st, 1877, and securing outstanding bonds of the aggregate par value of four hundred and forty-five thousand dollars ($445,000), together with interest thereon at the rate of seven (7) per cent. per annum, which said mortgage was and still is a lien upon that portion of the railway of said Minneapolis & St. Louis Railway Company extending from Minneapolis to Merriam junction, in said State of Minnesota.

3. Another mortgage executed by the Minneapolis & St. Louis Railway Company to the Farmers' Loan and Trust Company, of New York city, dated February 1st, 1877, and securing out-
27 standing bonds of the aggregate par value of one million, one hundred thousand dollars ($1,100,000), together with interest thereon at the rate of seven (7) per cent. *per cent.* per annum, which said mortgage was and still is a lien upon those portions of the railway of said Minneapolis & St. Louis Railway Company extending from Minneapolis to White Bear, and from Minneapolis, by way of Merriam junction, to Albert Lea, all in said State of Minnesota.

4. Another mortgage executed by the Minneapolis & St. Louis Railway Company to the Central Trust Company, of New York city, commonly called the Iowa Extension mortgage, bearing date June 21st, 1879, and securing outstanding bonds of the aggregate par value of one million and fifteen thousand dollars ($1,015,000), together with interest thereon at the rate of seven (7) per cent. per annum, which said mortgage was and still is a lien upon those portions of the railway of said Minneapolis & St. Louis Railway Company extending from Minneapolis to White Bear, in Minnesota, and from Minneapolis, via Merriam junction and Albert Lea, Minnesota, to Fort Dodge, Iowa.

5. Another mortgage executed by the Minneapolis & St. Louis Railway Company to the Central Trust Company, of New York city, commonly called the Southwestern Extension mortgage, dated

December 1st, 1880, and securing outstanding bonds of the aggregate par value of six hundred and thirty-six thousand dollars ($636,000), together with interest thereon at the rate of seven (7) per cent. per annum, which said mortgage was and still is a lien upon
28 those portions of the railway of said Minneapolis & St. Louis Railway Company extending from Minneapolis to White Bear, in Minnesota, and from Minneapolis, via *of* Merriam junction and Albert Lea, Minnesota, and Fort Dodge, Iowa, to Angus, Iowa.

6. Another mortgage executed by the Minneapolis & St. Louis Railway Company to said Central Trust Company, of New York city, commonly called the income mortgage, dated December 10th, 1880, securing outstanding bonds of the aggregate par value of five hundred thousand dollars ($500,000), together with interest thereon at the rate of seven (7) per cent. per annum, which said mortgage was and still is a lien upon those portions of the railway of said Minneapolis & St. Louis Railway Company extending from Minneapolis to White Bear, Minnesota, and from Minneapolis, via Merriam junction and Albert Lea, Minnesota, and Fort Dodge, Iowa, to Angus, Iowa.

7. Another mortgage executed by said defendant, The Minneapolis & St. Louis Railway Company, to the Central Trust Company, of New York city, commonly called the Pacific Extension mortgage, dated June 1st, 1881, securing outstanding bonds of the aggregate par value of one million, three hundred and eighty-two thousand dollars ($1,382,000), together with interest thereon at the rate of six (6) per cent. per annum, which said mortgage was and still is a lien upon those portions of the railway of said Minneapolis & St. Louis Railway Company extending from Minneapolis to Hopkins, Minnesota, and from Hopkins, Minnesota, to Morton, Minnesota.

8. Another mortgage executed by said defendant, The
29 Minneapolis & St. Louis Railway Company, to said Central Trust Company, of New York city, commonly called the consolidated mortgage, dated January 2d, 1882, securing outstanding bonds of the aggregate par value of one hundred and eight thousand dollars ($108,000), together with interest thereon at the rate of six (6) per cent. per annum, which said mortgage was and still is a lien upon those portions of the railway of said Minneapolis & St. Louis Railway Company extending from Minneapolis to White Bear, in Minnesota, and from Minneapolis, via Merriam junction, to Albert Lea, Minnesota, and from the southern boundary of the State of Minnesota, via Fort Dodge, Iowa, to Angus, Iowa, and from Hopkins, Minnesota, to Morton, Minnesota.

9. Another mortgage executed by said Minneapolis & St. Louis Railway Company to said Central Trust Company, of New York city, commonly called the improvement and equipment mortgage, dated October 12th, 1882, securing outstanding bonds of the aggregate par value of three million, eight hundred and eighty-seven thousand dollars ($3,887,000), together with interest thereon at the rate of six (6) per cent. per annum, which said mortgage was a lien upon those portions of the railway of said Minneapolis & St. Louis Railway Company extending from Minneapolis to White Bear, in

Minnesota, and from Minneapolis, via Merriam junction and Albert Lea, Minnesota, and Fort Dodge, Iowa, to Angus, Iowa, and from Hopkins to Winthrop, Minnesota, as well as upon all, or substantially all, the equipment and movable property of said defendant, The Minneapolis & St. Louis Railway Company.

That said last-mentioned mortgage did not in any way convey or cover, and was not in any way a lien upon, that portion of the railway of said Minneapolis & St. Louis Railway Company extending from Winthrop, Minnesota, to Morton, Minnesota.

That each of said mortgages was on said day, and (with the single exception of said improvement and equipment mortgage) still is, a lien upon the portion or portions of said railway covered by it superior in equity to the lien of any and every mortgage subsequent to it in date.

V.

That in addition to said mortgages above mentioned, there existed upon said 28th day of June, 1888, a number of contracts of various kinds, to wit: construction contracts, traffic agreements, trackage agreements, leases, etc., which upon said day, constituted liens upon the lines of said defendant, The Minneapolis & St. Louis Railway Company, superior in equity to the lien of said improvement and equipment mortgage above mentioned.

VI.

That prior to said 28th day of June, 1888, said Central Trust Company, of New York, was duly removed as trustee of the trust created by the mortgage above mentioned, known as the improvement and equipment mortgage, and Henry Seibert, of New York, was duly appointed trustee thereunder as its successor and in its place
31 and stead, and forthwith entered upon the discharge of the duties of said trust.

VII.

That on said 28th day of June, 1888, said Henry Seibert, as trustee under said improvement and equipment mortgage, duly commenced an action in this said court, wherein said Seibert, as such trustee, was plaintiff, and said defendant, The Minneapolis and St. Louis Railway Company, and others were defendants, for the purpose of foreclosing said improvement and equipment mortgage and of securing a sale in said action of all the franchises, rights, property and estates upon which the same was a lien or charge; that such proceedings were had in said action that thereafter, and on said 28th day of June, 1888, by an order of this said court, entered in said action, a receiver was appointed in aid of such foreclosure of all the property, railway, franchises, rights and estates of said defendant, The Minneapolis & St. Louis Railway Company, which said receiver forthwith qualified and thereupon took possession of all said property, railway, franchises, rights and estates of said railway company, and thereafter continued to hold and operate the same until the 2nd day of November, A. D. 1894, as hereinafter stated.

VIII.

That thereafter such proceedings were had in said foreclosure action that on the 29th day of June, 1893, an interlocutory decree was entered in said action whereby it was ordered and de-
32 creed that said improvement and equipment mortgage be foreclosed, and that all the property, railway, franchises, rights and estates, upon which said improvement and equipment mortgage was then a lien, should be sold at judicial sale, at the time and in the manner therein provided, in case no redemption thereof should be made as therein provided; that no redemption of said property, railway, franchises, rights or estates having been made as in said decree provided, all said property, railway, rights, franchises and estates upon which said improvement and equipment mortgage was a lien or charge were, under and in accordance with the provisions of said interlocutory decree, offered for sale upon the 11th day of October, 1894, and then and there sold by the sheriff of Hennepin county, Minnesota, to F. P. Olcott, as chairman of a committee organized to purchase said property, and thereupon a certificate of such sale was duly executed and delivered by said sheriff to said Olcott, as such chairman; that thereafter and upon the 31st day of October, 1894, said sale was duly confirmed by this said court, and a final decree duly entered in said foreclosure action, adjudging the title to the railway, property, franchises, rights and estates so sold to be in the assignees (hereinafter mentioned) of said Olcott, purchaser at said foreclosure sale.

IX.

That said interlocutory decree did not order that portion of the railway of said defendant, The Minneapolis & St. Louis Railway Company, extending from Winthrop to Morton, in the State
33 of Minnesota, to be sold in said foreclosure action, nor was the same advertised to be sold or offered to be sold, or in fact sold therein, nor covered by or included or mentioned in said interlocutory decree, or the notice of sale given thereunder, or the sheriff's said certificate of sale, or said final decree; but that it was adjudged in said interlocutory decree only that said improvement and equipment mortgage was a lien upon that portion of the line of railway of said Minneapolis & St. Louis Railway Company extending from Hopkins to Morton, that lies between Hopkins and Winthrop, and, in said final decree, it was adjudged only that the title to the same portion of said line was in said assignees of said Olcott; that said improvement and equipment mortgage has never been foreclosed upon or as against that portion of the lines of said Minneapolis & St. Louis Railway Company lying between Winthrop and Morton, in Minnesota; that in said foreclosure action all amounts due upon any and all the bonds and coupons secured by said improvement and equipment mortgage, and all indebtedness secured thereby, were fully paid and satisfied, and that said mortgage was and is fully paid and satisfied, and is no longer a lien, either in law or equity, upon any part of the property or estate now

or formerly belonging to said Minneapolis & St. Louis Railway Company.

X.

That immediately after said foreclosure sale said F. P. Olcott, as chairman of said committee of purchasers, sold and assigned
34 to divers persons said certificate of sale and all right, title and interest thereunder or by virtue of said sale arising, and his said assignees, pursuant to the statutes of the State of Minnesota in such case provided, did on or about the 2nd day of November, 1894, organize and incorporate a railway company called the Minneapolis & St. Louis Railroad Company, which said The Minneapolis & St. Louis Railroad Company thereupon, as successor of said Minneapolis & St. Louis Railway Company, became invested with all the property, railway, franchises, rights, privileges, immunities and estates embraced in said improvement and equipment mortgage and sold as aforesaid, and as such successor to said Minneapolis & St. Louis Railway Company, entered into and has ever since remained in possession of, operating and enjoying all said property, rights, franchises and estates, the receiver appointed in said action then and there (that is, on or about the said 2nd day of November, 1894), delivering all of the same unto said The Minneapolis & St. Louis Railroad Company upon said 2nd day of November, A. D. 1894.

XI.

That at the same time that said receiver delivered said property and rights above mentioned and sold as aforesaid unto said The Minneapolis & St. Louis Railroad Company, said receiver also delivered unto said railroad company, and said railroad company entered into possession of, and has ever since held, operated and enjoyed, that portion of the line of railway of said defendant,
35 The Minneapolis and St. Louis Railway Company extending from Winthrop to Morton, in the State of Minnesota; that plaintiff is informed and believes that no conveyance of said portion of said railway extending from Winthrop to Morton, as aforesaid, or of any interests therein, has ever been made to said The Minneapolis & St. Louis Railroad Company, but that said railroad company is now, and ever since said 2nd day of November, 1894, has been wrongfully in possession of and enjoying that portion of said railway under claim of title to the same by virtue of said foreclosure sale, made as above stated in said foreclosure action above mentioned, and under no other title or claim of title; that said receiver of said Minneapolis & St. Louis Railway Company no longer has any portion of the railway, property, franchises, rights of estates of said defendant, The Minneapolis & St. Louis Railway Company, in his hands, but only, if anything, a portion of the avails thereof, realized upon said foreclosure sale and held by him subject to distribution in accordance with the directions contained in said interlocutory decree of sale; that said receiver has, so far as the custody, care or control of any part of the estate of said Minneapolis & St.

Louis Railway Company is concerned, entirely discharged his trust, and is no longer entitled to take or hold any part of said estate.

XII.

Plaintiff is informed and believes, and so alleges, that ever since said 2nd day of November, 1894, the operation of said portion of said railway extending from Winthrop to Morton, in said
36 State of Minnesota, as aforesaid, has been profitable, and has produced in excess of the cost of operating the same and of the reasonable rental upon the equipment used thereabout, and in excess of that portion of the interest upon the bonded indebtedness secured by the existing mortgages upon said portion of said railway properly apportionable to said portion of said railway, as income, a considerable sum of money; and plaintiff alleges that the operation of said portion of said railway will, in all probability, continue permanently to produce an income in excess of such operating expense, rental and interest.

XIII.

That on the 27th day of December, A. D. 1887, Revilo F. Parshall, in an action then pending in the circuit court of the United States for the district of Minnesota, said court then and there having jurisdiction of all the parties, and of the subject-matter of said action, wherein said Revilo F. Parshall was plaintiff and said defendant herein, Minneapolis & St. Louis Railway Company, was defendant, recovered a judgment against said defendant, Minneapolis & St. Louis Railway Company, for the sum of eight thousand seven hundred and nineteen dollars and ten cents ($8,719.10), which said judgment was then and there duly entered in said action; that upon said 27th day of December, 1887, said judgment was duly docketed in the office of the clerk of said circuit court of the United States for the district of Minnesota, and then and there became a lien upon all the estates, real and personal, legal and equitable of
37 said defendant, Minneapolis & St. Louis Railway Company, within said district of Minnesota, which said judgment is wholly unpaid, and has ever since remained and now is a lien and charge upon all the estates, rights and property of said defendant, Minneapolis & St. Louis Railway Company, situate in said district of Minnesota; that said judgment so entered in said action, and described as aforesaid, has not been in any way reversed, modified or superceded, and that there is no appeal or writ of error or other proceeding pending upon which said judgment can be reviewed, but that said judgment is still in full force and effect.

XIV.

That after the rendition, entry and docketing of said judgment against said defendant, Minneapolis & St. Louis Railway Company, and after the same had become a lien and charge upon the estates and property of said defendant, Minneapolis & St. Louis Railway Company, as aforesaid, the president, attorneys and other officers of

said defendant, well knowing the insolvency of said corporation, anticipating the beginning of an action by the trustee under said improvement and equipment mortgage, to foreclose said mortgage, and anticipating the appointment of a receiver in said action for all the property and estates of said Minneapolis & St. Louis Railway Company in aid of such foreclosure, secured a stay of proceedings and of execution in said action wherein said Parshall was plaintiff and said railway company was defendant, for the
38 alleged purpose of providing time within which to have settled a bill of exceptions therein and to make a motion therein for a new trial of said action, and that said president, attorneys and other officers of said railway company did secure such stay of proceedings and execution, and delayed said action until after the commencement of the foreclosure action anticipated and begun as aforesaid, and the appointment of a receiver therein, so that when said stay of proceedings was vacated by the order of said United States circuit court, as it was thereafter vacated, it was impossible, and has ever since been impossible, to enforce said judgment or execution upon it or to realize thereupon, for the reason that all the property of said defendant corporation upon which execution could be levied was at the time of the vacation of said stay, and ever since has been in the custody or pretended custody of said receiver, or in the hands of the Minneapolis & St. Louis Railroad Company which had bought the same at foreclosure sale thereof, as aforesaid, and while the same still remained in the custody of said receiver.

XV.

That after the entry of said judgment in favor of said Parshall, and before the filing of this complaint, a writ of execution in due form of law, out of and under the seal of said United States circuit court for the district of Minnesota, subscribed by the clerk of said court, and attested in the name of the Chief Justice of the Supreme Court of the United States, duly endorsed, directed and delivered to the United States marshal for said
39 district of Minnesota, wherein said defendant, Minneapolis & St. Louis Railway Company, then had and yet has property or rights and an office, and still legally has its principal place of business, was duly issued against the property of said defendant, Minneapolis & St. Louis Railway Company, and thereafter, and before the filing of this complaint, and on or about the 5th day of October, A. D. 1892, was returned into said court wholly unsatisfied, and said judgment does yet remain and is wholly unsatisfied and unpaid; that there is now due and owing upon said judgment said sum of eight thousand seven hundred and nineteen dollars and ten cents ($8,719.10), with interest from the 27th day of December, 1887, in the aggregate not less than the sum of thirteen thousand five hundred dollars ($13,500).

XVI.

That on or about the 1st day of October, 1892, said Revilo F. Parshall duly sold said judgment, together with any and all sum

or sums of money or other benefit or advantage that might be had or obtained by reason of the same, unto this plaintiff, Henry A. Gardner, and then and there duly executed and delivered unto plaintiff an assignment of said judgment duly signed, sealed and acknowledged in accordance with law, which said assignment of judgment was heretofore, and on the 18th day of October, 1895, duly filed in the office of the clerk of said United States circuit court for the district of Minnesota; that plaintiff is, and ever since said 1st day of October, 1892, has been, the owner of and entitled to said
40 judgment and all benefit or advantage to be had or obtained by reason thereof, and to enforce the same by execution or otherwise, and to prosecute any and all legal proceedings upon said judgment, and to give good and sufficient releases and discharges as fully as might have been done by said Revilo F. Parshall while said Parshall owned and held said judgment.

XVII.

That said Minneapolis & St. Louis Railway Company is wholly insolvent, and save said portion of said railway extending from Winthrop to Morton as aforesaid, has not, and since said foreclosure sale has not had, any property whatsoever, and has not, and since said 28th day of June, 1888, has not had, any money out of which to satisfy the judgment of plaintiff in whole or in part.

XVIII.

That said portion of said railway extending from Winthrop to Morton, aforesaid, consists of road-bed, rails, yards, station grounds, station-houses, bridges, culverts and such other lands and structures only as constitute a part of the corpus of the railway of said Minneapolis & St. Louis Railway Company, and that the same and all thereof are necessary in the operation of said railway.

XIX.

That said Pacific Extension mortgage and said consolidated mortgage are still liens upon said portion of said railway, and that
41 said mortgages still secure respectively all the bonds secured by them upon said 28th day of June, 1888, and that, in consequence, any sale of said portion of said railway upon execution, if the same could be had, would be ineffectual, inasmuch as only a nominal sum could be realized upon such sale.

XX.

That since the entry of plaintiff's said judgment as aforesaid, each of a large number of persons, copartnerships and corporations, has held shares of the capital stock of said defendant, The Minneapolis & St. Louis Railway Company, and that each of a large number of persons, copartnerships and corporations now hold shares of such capital stock; that the names of many of such shareholders are to this plaintiff unknown, and that plaintiff has no

knowledge or information as to the number of shares held by any one of the persons, copartnerships or corporations that have been or are such shareholders respectively, save as hereinafter stated.

XXI.

That among such shareholders are the following defendants above named: William L. Bull, August Belmont, Edwin Hawley, Frederick P. Olcott, Richard B. Hartshorne, William A. Read, J. Kennedy Tod and William Strauss, and that said William L. Bull, August Belmont, Frederick P. Olcott, Richard B. Hartshorne, William A. Read, J. Kennedy Tod, William Strauss and William D. Washburn are now, and each of them is now, a shareholder in said defendant, The Minneapolis & St. Louis Railway Company.

42

XXII.

That in addition to said shareholders above named, there are other persons, copartnerships and corporations to plaintiff unknown, who have been since the entry of plaintiff's said judgment, and others likewise unknown, who are now shareholders in said defendant, The Minneapolis & St. Louis Railway Company.

XXIII.

That plaintiff is informed and believes, and so alleges, that said individual defendants above named now hold at least the number of shares in said defendant, The Minneapolis & St. Louis Railway Company, next hereinafter set opposite their names, respectively, which said shares are of the par value of one hundred dollars ($100) each:

William L. Bull	200	shares.
August Belmont	100	"
Edwin Hawley	2,100	"
Richard B. Hartshorne	100	"
F. P. Olcott	10,623	"
W. A. Read	4,720	"
William Strauss	2,200	"
J. Kennedy Tod	2,900	"
William D. Washburn	100	"

XXIV.

That each of said shareholders above named, except Edwin Hawley and William D. Washburn, acquired all the shares of stock in said Minneapolis & St. Louis Railway Company held by
43 him, as aforesaid, subsequently to April 26th, 1891; that said Hawley acquired 600 shares of his said stock November 10th, 1884, 100 shares February 4th, 1885, 300 shares June 24th, 1889, 1,100 shares July 20th, 1892; that plaintiff has no knowledge or information sufficient to form a belief as to when said Washburn acquired his said shares of stock, or any of them.

XXV.

That under the constitution and laws of the State of Minnesota each of said shareholders above named, and every person, copartnership and corporation that since said 27th day of December, 1887, has been a shareholder in said defendant, Minneapolis & St. Louis Railway Company, is liable to contribute herein to the payment of plaintiff's said judgment a sum equal to the par value of the shares of stock held by him, them or it, as the case may be, in said defendant, The Minneapolis & St. Louis Railway Company, or such proportion of said amount as may be necessary in order to satisfy said judgment in full.

Wherefore, for himself and in behalf of all persons in interest with him, especially such as come into this action and contribute to the expense thereof, plaintiff demands judgment and prays relief as follows:

That all the property, stock, things in action and effects of said defendant, The Minneapolis & St. Louis Railway Company, be sequestrated and a receiver be appointed for and of the same;

That an accounting may be had as to the assets of said rail-
44 way company, and that the same may be ascertained by or under the direction of the court, and be got in by such receiver and converted into money under the direction of this court;

That an accounting may be had as to all the just debts of said railway company, and particularly as to such as may be entitled to share in the proceeds of the assets of said railway company or in any amounts realized by the enforcement of the liability of its shareholders, and that all said debts may be ascertained by or under the direction of this court, and that the claim of this plaintiff, especially, may be adjudged and decreed a valid and just debt of said defend ant corporation, The Minneapolis & St. Louis Railway Company, and a lien upon all its property, rights, and interests, and that plaintiff may have judgment herein therefor—that is to say, in the sum of eight thousand seven hundred and nineteen dollars and ten cents ($8,719.10), with interest thereon at the rate of seven (7) per cent. per annum from the 27th day of December, A. D. 1887;

That an accounting may be had by said railway company and each of said other defendants above named as to the number and par value respectively of the shares of stock of said railway company at any time outstanding since said 27th day of December, 1887, and as to the persons at any time holding the same, and as to the times during which each shareholder has held each of such shares of stock, and that all the same may be ascertained by or under the direction of this court;

That the balance due or that will be due upon each and
45 all the debts of said railway company, after the application upon such debts respectively of the amounts proper to be applied upon them respectively of or from the proceeds of the assets of said railway company, may be ascertained by or under the direction of this court;

That the persons who are by law liable to contribute by reason of

being, or having been, shareholders in said railway company to satisfy the balance found to be due upon said debts or any of them, may also be ascertained;

That any person, copartnership or corporation found to be or to have been, a shareholder in said railway company at any time since said 27th day of December, 1887, other than those above named, may be joined as and made parties defendant herein, as soon as the names of the same shall be ascertained;

That which, if any, of the shareholders in said railway company or of those who have been shareholders in said railway company since said 27th day of December, 1887, are insolvent or unable for any cause to pay their just proportion of the debts of said company, may also be so ascertained;

That the persons entitled to share in the fund produced by the sale of the assets of said railway company and in the fund produced by such contributions respectively, and the proportions in which such persons are entitled to share in each or both of such funds, may also be so ascertained;

That each of the parties found to be liable to contribute as a shareholder to the payment of the debts of said railway company may be adjudged and compelled to pay into this court in this
46 action, for the benefit of plaintiff and those in interest with him, the amount for which he is found to be liable as aforesaid;

That all moneys so realized or realized upon the conversion of the assets of said railway company may be directed to be, and may be, distributed under the direction of the court herein, among those parties hereto who may be found to be entitled to the same in the proper proportions;

And for such other and further relief as may be just and seem meet to your honorable court.

F. W. M. CUTCHEON,
Attorney for Plaintiff.

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Frank W. M. Cutcheon, being first duly sworn, deposes and says: That he is the attorney for Henry A. Gardner, the plaintiff named in the foregoing amended complaint; that he has read said complaint and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that the reason why this verification is not made by said Henry A. Gardner personally, is that said Henry A. Gardner is absent from the county of Ramsey and State of Minnesota, wherein resides this affiant.

FRANK W. M. CUTCHEON.

Subscribed and sworn to before me this 13th day of May, A. D. 1896.

JOSEPH D. HALPIN,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minnesota.*

47 EXHIBIT "A."

An agreement made the 20th day of April, A. D. 1881, by and between the Minneapolis & St. Louis Railway Company, a corporation of the State of Minnesota, party of the first part, hereinafter called the first party; the Minneapolis & Duluth Railroad Company, a corporation of the State of Minnesota, party of the second part, hereinafter called the second party; the Minnesota & Iowa Southern Railroad Company, a corporation of the State of Iowa, party of the third part, hereinafter called the third party; and the Fort Dodge & Fort Ridgely Company, a corporation of the State of Iowa, the party of the fourth part, hereinafter called the fourth party.

Whereas, the Minneapolis & St. Louis Railway Company, the first party hereto, is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, and has an authorized capital stock of six million dollars at par, divided into shares of one hundred dollars each, of which there have been issued and are yet to be issued under existing contracts, in all thirty-two thousand shares, being $3,200,000 at par; and the said company has been authorized to build, among other railways in the State of Minnesota, the railway below mentioned, and under its corporate powers has already constructed and put into operation a railway extending from Minneapolis, via Albert Lea, Minnesota, to the Iowa State line, where it connects with the railway of the Minnesota & Iowa Southern Railroad Company, the third party hereto, and
48 also owns and holds under lease and operates other connecting railways in the State of Minnesota, among others the railroad of the Minneapolis & Duluth Railroad Company, the second party hereto.

And whereas, the Minneapolis & Duluth Railroad Company, the second party hereto, is a corporation formed and existing under and by virtue of the laws of the State of Minnesota, and has an authorized capital stock of $200,000 at par, divided into two thousand shares of one hundred dollars each, of which there have been actually issued eighteen hundred and thirty-five shares, being $183,500 at par; and the said second party has been authorized to build, among other railways in the State of Minnesota, the railway below mentioned, and under its corporate powers has constructed, and has now in operation, through the first party as lessee, a line of railway extending from a point on the St. Paul & Duluth railroad at White Bear Lake junction, in the county of Ramsey, to the city of Minneapolis, in the county of Hennepin, Minnesota, and to a point of intersection with the aforesaid railway of the first party hereto, and forming therewith a continuous line of railway from White Bear Lake junction aforesaid, via Minneapolis and Albert Lea aforesaid, to the Iowa State line aforesaid.

And whereas, the Minnesota & Iowa Southern Railroad Company, the third party hereto, is a corporation formed and existing under and by virtue of the laws of the State of Iowa, and has an

authorized capital stock of three million ($3,000,000) dollars at par, divided into thirty thousand shares of one hundred dollars each, of which there have been issued and are yet to be issued under existing contracts, in all twelve thousand shares of $100 each, being one million two hundred thousand dollars at par; and the said third party has been authorized to build, among other railways in the State of Iowa, the railway below mentioned, and under its corporate powers has constructed and has now in operation, through the first party as lessee, a line of railway extending from the intersection with the aforesaid railway of the first party, upon the State line between Iowa and Minnesota, via Forest City, to or near Livermore, Iowa, where it connects with the railway of the Fort Dodge & Fort Ridgely Railroad Company, the fourth party hereto.

And whereas, the Fort Dodge & Fort Ridgely Railroad Company, the fourth party hereto, is a corporation organized and existing under and by virtue of the laws of the State of Iowa, and has an authorized capital stock of nine million ($9,000,000) dollars, divided into ninety thousand (90,000) shares of one hundred ($100) dollars each, of which there have been issued and are yet to be issued under existing contracts, thirty-three hundred and forty-eight shares, being three hundred and thirty-four thousand eight hundred dollars at par; and the said fourth party has been authorized to construct and operate a railway from the State line between Iowa and Minnesota to Fort Dodge, and points southerly and southwesterly therefrom, and the other railways below mentioned, and acting under its corporate powers has constructed and has now in operation, through the first party as lessee, a line of railway extending from the point of intersection with the railway of the third party hereto, at or near Livermore, Iowa, via Humboldt and Fort Dodge to Hart's ford, and has arranged for an extension of said line to points southerly and southwesterly of Fort Dodge, with branches therefrom to Council Bluffs, Iowa, and elsewhere.

And whereas, the said first party, under its charter and the laws of the State of Minnesota, and especially under an act of the legislature of the State of Minnesota entitled "An act to amend an act entitled An act to amend an act entitled An act to incorporate the Minnesota Western Railroad Company, approved March 3d, 1853, and the acts amendatory thereof, approved February 4th, 1870," approved the 2d day of March, A. D. 1881, is empowered, with the consent of two-thirds in amount of its stockholders present at a meeting called for that purpose, to acquire any other connecting railway or railways, whether within or without the State of Minnesota, and also to consolidate its capital stock, franchises and property, with those of any other connecting railway company or companies, whether organized under the laws of the State of Minnesota or of any other State or Territory of the United States, in the construction of whose lines of railway it should have aided, or whose lines of railway should be held under lease by it.

And whereas, the said first party has aided in the construction of the railways of both the third and fourth parties, and also now

holds and operates all the railways of the second, third and
51 fourth parties under leases made to it by the said second,
third and fourth parties respectively, and the said railways of the second, third and fourth parties form, with the railway of the first party, a connected and continuous line of railway extending from White Bear Lake junction aforesaid, via Minneapolis and Albert Lea, Minnesota, and via Forest City, Livermore, Humboldt and Fort Dodge, Iowa, to points southerly and southwesterly from Fort Dodge.

And whereas, the said second party hereto is empowered under and by virtue of the laws of the State of Minnesota with the consent of two-thirds in amount of its stockholders present at a meeting called for that purpose, to consolidate its capital stock, franchises and property with those of any other connecting railway company or companies organized under the laws of the State of Minnesota, and under and by virtue of the aforesaid act of the legislature of Minnesota approved March 2d, A. D. 1881, is authorized to consolidate its stock, property and franchises with those of the first party, and of other corporations consolidated or consolidating therewith.

And whereas, the said third and fourth parties hereto are respectively empowered under and by virtue of the laws of the State of Iowa to make joint running arrangements with or to lease, or to sell their railways, properties and franchises to the first party hereto, or one to the other as owning or operating railways connecting with the railway of the said corporations respectively, and are also respectively empowered with the consent of three-fourths in amount of
their respective stockholders, by purchase, sale or otherwise
52 to merge and consolidate their respective stocks, properties,
franchises and liabilities with those of the corporations owning and operating the said connecting railways.

And whereas, upon full examination and consideration of the property and affairs of each of the parties hereto, and of the relative positions of the railways of each company in respect to traffic between White Bear Lake junction and the city of Minneapolis, and points southerly and southwesterly therefrom, the parties hereto consider that the business and profits of each company would be largely augmented and the interest of the stockholders of each company greatly promoted by the joint operation of their several railways under one management, and the equitable division of profits of such joint operation and division of profits can best be effected by a full and complete uniting of the interest and property of the said several companies under the management and control of a single board of trustees and by the consolidation and amalgamation of the capital stock, franchises, properties, earnings and management of all the said companies as fully as possible into one corporation upon the terms of this agreement.

Now, therefore, this agreement witnesseth: that in consideration of the premises and of the mutual covenants hereof, and of the sum of five dollars by each of the said parties hereto, paid to each of the other parties hereto, the receipt of which is hereby acknowledged,

it is hereby mutually covenanted and agreed by and between
53 the said parties hereto, each covenanting for itself, its successors and assigns, that they will, and hereby do, unite their interests and property, management and earnings, and will and hereby do make a full transfer of their respective railways, property, franchises and management to the new corporation hereinafter named, and will and do hereby make as full and complete consolidation and amalgamation as possible of their respective corporations, stocks, franchises, property, earnings and management under the name of "The Minneapolis & St. Louis Railway Company," to be a corporation of Minnesota and Iowa, in the manner following, that is to say:

I. The aforesaid corporations, parties hereto, do severally agree that from and after the first day of June, A. D. 1881, the entire railways, property, franchises, earnings and interests of every kind now held by the said companies respectively, and all railroads, properties, franchises, earnings and interests hereafter acquired in any way by either of said companies, shall be forever owned, held and operated jointly as one line of railway and as joint estate, to be managed and controlled under the name of "The Minneapolis & St. Louis Railway Company," of Minnesota and Iowa, forever, for the benefit of the stockholders of the respective corporations, parties hereto, upon the terms hereinafter named and by the board of trustees constituted as hereinafter provided, and that the stockholders of the respective companies, parties hereto, shall be entitled to exchange the stock held by
them in each of the companies, parties hereto, for stock of the
54 said "Minneapolis & St. Louis Railway Company," of Minnesota and Iowa, upon the terms and in the proportions hereinafter named, and that, after the exchange of stock as aforesaid, the certificates of stock in the said new company so received shall be full evidence of the rights of the aforesaid stockholders to participation in the profits of the new company.

II. The aforesaid companies, parties hereto, do hereby further severally agree that from and after the said first day of June, A. D. 1881, they shall become and be forever consolidated, amalgamated and merged into one new or consolidated company or body corporate under the name of "The Minneapolis & St. Louis Railway Company," a corporation of Minnesota and Iowa, and by that name shall have and use a corporate seal; shall sue and be sued, plead and be impleaded, contract and be contracted with; and shall use, enjoy and exercise all the powers and franchises of each of the said corporations, parties hereto.

III. The said corporations, parties hereto, further agree, that from and after the said first day of June, 1881, the entire railways, property, franchises, earnings and interests of every kind of the parties hereto, severally, and all the railways, property, franchises, earnings and interests to which the parties hereto severally are or hereafter may be entitled, shall be forever owned, held and operated jointly as one line of railway, to be managed and controlled by the said "The Minneapolis & St. Louis Railway Company," of Minnesota and Iowa, and that all the estates, real, personal and mixed, and all

the rights, privileges, franchises, immunities, credits, grants,
55 donations, easements and interests belonging to the parties hereto, severally, or to which either of the said parties shall be at any time entitled, shall become and be the property of and be vested in the said consolidated company. And it is hereby declared that the said "The Minneapolis & St. Louis Railway Company," of Minnesota and Iowa, shall be empowered as fully as any or all of the parties hereto may be, to borrow money, and for that purpose to issue bonds and to secure the payment of the same by mortgages on the property and franchises of each and all of the said parties hereto, and to sell the said bonds at any rate, and also to purchase, lease and construct other continuous lines of railway, to construct and purchase bridges, and to purchase and hold the stocks and bonds of other railway, bridge or transportation companies and to consolidate its stock and property therewith, and that the said "Minneapolis & St. Louis Railway Company," of Minnesota and Iowa, shall at all times be empowered to use the name of either of the corporations, parties hereto, in all ways and for all purposes whenever the same shall be necessary or convenient in the conduct or extension of the railways, business or property hereby united, transferred and amalgamated.

IV. The said corporations, parties hereto, in consideration of the premises, do further severally and each of the parties hereby does agree to grant and does hereby grant, bargain, sell, release, enfeoff, convey, assign, demise, confirm, transfer and set over forever unto the said consolidated company, "The Minneapolis & St. Louis Rail-
way Company," of Minnesota and Iowa, all and singular their
56 and each of their respective railways, properties and estates, real, personal and mixed, and their respective franchises, rights, easements, privileges, immunities and exemptions, and their respective earnings, tolls, increase and things in action at law or in equity, whether the aforesaid property, franchises and rights are now held and possessed or hereafter acquired, and wherever situated and however held; to have and to hold the same to the said "Minneapolis & St. Louis Railway Company," of Minnesota and Iowa, to its own use, benefit and behoof forever, as representing the interests hereby united and consolidated; and each of the said parties hereto does further agree to make, execute and deliver from time to time all deeds, grants, assignments, contracts, agreements, instruments and transfers necessary or convenient to carry fully into effect the covenants hereof and to vest as fully as in law may be, all its property, franchises, rights and immunities aforesaid in the said consolidated company.

V. The said corporations, parties hereto, do further severally agree that all the debts and liabilities of each of the parties hereto, shall be deemed and taken, and they are hereby declared to be, from and after the said first day of June, 1881, the debts and liabilities of the said consolidated company, the Minneapolis & St. Louis Railway Company, of Minnesota and Iowa; and that all contracts executed or executory made or assumed before the said first day of June, 1881, by either of the parties hereto, shall be as binding upon

the said consolidated company as they were at any time upon the corporation making the same.

57 VI. The said new company, the Minneapolis & St. Louis Railway Company, of Minnesota and Iowa, shall, for the purpose of representing the consolidated property, have a total capital stock of twenty million ($20,000,000) dollars, divided into two hundred thousand shares of the par value of one hundred dollars each, of which not more than eighty thousand shares may be issued and held as preferred shares of the character hereinafter described, and the remaining one hundred and twenty thousand shares as common shares.

There shall be issued of the said total capital stock in the first instance and for exchange for the shares of stock of the several corporations, parties hereto, not more than one hundred thousand shares, of which not more than forty thousand shares shall be preferred stock, and not more than sixty thousand shares common stock, and all of the said shares so issued in exchange for the shares of stock of the corporations, parties hereto, shall be taken and deemed to be and shall be full-paid and unassessable stock and not subject to any further payments or calls whatsoever.

The said shares of stock so to be issued in exchange for the existing stock of the parties hereto shall be divided and apportioned as is hereafter set forth.

If any dividends are declared by the said new company, the holders of the aforesaid preferred shares of stock shall be entitled to receive in each and every year two semi-annual dividends equal to three and one-half per centum upon their said preferred shares, payable out of the earnings of the company, before the

58 holders of shares of common stock shall be entitled to receive any dividends. The right of the preferred shareholders, however, to such dividends out of the net earning shall not be cumulative; that is to say, that if the aforesaid dividends of three and one-half per centum upon the preferred stock are not actually declared in any period of six months, no right shall exist in favor of the holders of such preferred stock to have such dividends afterwards declared as for the said period of six months.

After the payment of the aforesaid dividends of seven per centum annually to the holders of the said shares of preferred stock, then the holders of shares of said common stock shall be entitled to receive not exceeding two semi-annual dividends of three and one-half per centum each, in each and every year, provided that the directors of the company deem it proper to declare further dividends out of the net earnings.

After the holders of the said common stock shall have received in any period of twelve months, dividends equal to seven per centum upon the stock held by them, then all further dividends declared during such period shall be divided *pro rata* between the holders of the preferred stock and the holders of the common stock.

VII. The said shares of capital stock of the new or consolidated company, the Minneapolis & St. Louis Railway Company, of Minnesota and Iowa, which are to be exchanged for stocks of the several

corporations referred to, shall be issued and distributed in the manner following, namely:

1. There shall be issued in exchange for the thirty-two
59 thousand shares aforesaid of stock of the Minneapolis & St. Louis Railway Company, of Minnesota, the first party hereto, in the aggregate the amount of forty thousand shares of the said preferred stock of the said consolidated company, being four million dollars at par of such new preferred stock; and such new stock shall be delivered *pro rata* among the holders of the said old stock, in proportion to the amount of such old shares held by them respectively, or to which they are respectively entitled to receive under existing contracts. But each holder of the said old stock shall have the right upon the return or surrender of one-fifth of the number of shares of such preferred stock so surrendered by him, five shares of common stock of the new company; and any preferred stock so surrendered shall not be extinguished thereby, but shall be held in the treasury of the company as full-paid stock to be used for the purposes and business of the said new company.

2. There shall be issued in exchange for the eighteen hundred and thirty-five shares aforesaid of the stock of the Minneapolis & Duluth Railroad Company, eighteen hundred and thirty-five shares of the said common stock of the said consolidated company, being one hundred and eighty-three thousand five hundred dollars at par of the said common stock, and each holder of such old stock shall be entitled to receive an amount of such new common stock equal at its par value to the par value of the said old stock held by him.

3. There shall be issued in exchange for the twelve thousand shares aforesaid of the stock of the Minnesota & Iowa South-
60 ern Railroad Company, and for the thirty-three hundred and forty-eight shares aforesaid of the Fort Dodge & Fort Ridgely Railroad Company, the third and fourth parties hereto, in an aggregate, the amount of fifteen thousand three hundred and forty-eight shares of the said common stock of the said consolidated company, being one million five hundred and thirty-four thousand eight hundred dollars at par of said common stock, and each holder of the said old stock shall have the right to receive an amount of shares of such new common stock equal at its par value to the par value of the said old stock held by him.

4. The shares of the new corporation to be issued, as provided under this article, in exchange for the said old shares, may be issued to the present officers of the corporations of the first, second, third and fourth parts, respectively, for distribution by such respective officers, to the holders of the said old stock of the said corporations, parties hereto respectively, and to those who are entitled to receive such old shares respectively, in exchange for such old stock upon the terms hereinbefore stated, and in that case such officers, respectively, shall collect and surrender to the said new or consolidated company, the said old shares so taken in exchange, which old shares shall be assigned to and held forever by the said new or consolidated company for the purpose of this agreement, and a

statement that they are so held shall be stamped upon their face accordingly.

5. The board of directors of the said new or consolidated company, may nevertheless provide for the exchange of its said
61 new stock by itself directly with the holders of the old stock of either or all of the said parties of the first, second, third and fourth parts hereto, and with those entitled to such old stock of either of the said parties hereto, making such arrangements in this respect as to the stockholders of either of the said parties as may be deemed most convenient; but whether the said stocks are so exchanged directly or otherwise, the shares of such old stock shall be transferred and held and stamped as above provided.

VII. The estate and affairs of the said consolidated company, the Minneapolis & St. Louis Railway Company, of Minnesota and Iowa, shall be managed by a board of nine (9) trustees or directors, who shall elect from time to time, after the first year, a president, treasurer and secretary, and such other officers as they may by their by-laws direct, for such terms as may be fixed by such by-laws.

The names and places of residence of the directors and officers of the said new company for the first year shall be as follows:

Directors.	Residences.

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Officers.	Residences.
—— ——, president,	——.
—— ——, vice-president,	——.
—— ——, treasurer,	——.
—— ——, secretary,	——.

The terms of office of the said directors shall extend unto the first Tuesday of October, 1881, and until their successors shall be chosen. The said officers shall hold the office for the same period, but either of the officers may be removed at any time by a vote of the board of directors.

After the first year the directors shall be chosen by the annual meeting of stockholders, to be held at the office of the company at Minneapolis, Minnesota, on the first Tuesday of the month of October in each year and shall hold their office for one year, and until their successors shall be chosen. In case the election of directors is not held upon the stated day, the directors shall call a meeting of the stockholders, upon notice of not less than thirty days, for the purpose of electing directors.

IX. Any of the holders of the shares of stock in either of the original corporations, parties hereto, who shall decline to convert their shares of stock into shares of the stock of the new consolidated corporation, shall be entitled to receive from the new consolidated corporation the full actual value of such stock immediately prior to such consolidation.

If such stockholders and the new corporation cannot agree
63 upon the value of such stock, such value may be fixed by the award of three disinterested arbitrators, one of whom shall

be appointed by such stockholder and one by such consolidated company, and the third by the two arbitrators so selected. If such stockholder declines to make such arbitration, the said value of his shares of stock shall be assessed by three disinterested commissioners appointed for that purpose by the supreme court of the State under the laws of which the corporation whose stock is so held was organized.

X. The board of directors elected or acting as herein provided shall have for the time being full power and control over all the estate and property hereby transferred to the said new consolidated company, and shall exercise all the powers corporate and other of the said consolidated company as the successor of each of the parties hereto, and of each of the corporations, parties hereto, and may make by-laws prescribing the duties of the officers of the company and regulating the transactions of the company's affairs, and may by their by-laws, make a less number than a majority of their number sufficient for a quorum of the board, and confer all powers of the board of directors at the times when the board is not in session upon an executive committee, to consist of the president and not less than three members of the board.

The board of directors may authorize and direct the borrowing of money, and may issue bonds or other evidences of debt, and may secure the same, or any part thereof, by mortgages on the franchises and property of the company, to be executed in
64 the name of the company by the officers.

Any vacancy in the said board occasioned by death, resignation, removal or otherwise, may be filled by vote of the remaining members.

XI. This agreement shall be perpetual, and each of the parties hereto and said new consolidated company shall have the power, co-operating together, to perform every act and do everything which they may be advised is proper and necessary to carry into effect and more fully complete a perpetual union, merger, amalgamation and consolidation of the parties hereto on the terms herein provided.

XII. As to each of the parties hereto this agreement shall not become effectual until the same is in due form approved by the respective stockholders of each party.

XIII. It is especially agreed that a failure in law to fully carry into effect the intention of this agreement, or of any part thereof, as hereinbefore expressed, shall not render void any part or portion of this agreement that is in itself valid; but that all the valid covenants of this agreement shall, nevertheless, be binding and obligatory upon each of the parties hereto, and that this agreement and each part thereof shall take effect, so far as the same is lawful and authorized, notwithstanding the avoidance or invalidity of any other part thereof; and that in the event of any such failure, such steps shall be taken and such contracts shall be made as shall be advised by counsel to carry into effect, as far as possible, the intents and purposes of this agreement.

65 In witness whereof, the several parties hereto have caused their respective corporate seals to be affixed to these articles

of consolidation, and the same to be signed by their respective officers.

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY,

[CORPORATE SEAL.] By W. D. WASHBURN, *President*

Attest: WILLIAM D. HALE, *Secretary.*

In presence of—

M. P. HAWKINS.
ARTHUR J. ELLIOTT.

THE MINNEAPOLIS & DULUTH RAILROAD COMPANY,

[CORPORATE SEAL.] By ISAAC ATWATER, *President.*

Attest: WILLIAM D. HALE, *Secretary.*

In presence of—

M. P. HAWKINS.
ARTHUR J. ELLIOTT.

THE MINNEAPOLIS & IOWA SOUTHERN RAILROAD COMPANY,

[CORPORATE SEAL.] By JOHN MARTIN, *President.*

Attest: DAVID SECOR, *Secretary.*

In presence of—

M. P. HAWKINS.
HENRY L. MARTIN.

THE FORT DODGE & FORT RIDGELY RAILROAD COMPANY,

[CORPORATE SEAL.] By JOHN MARTIN, *President.*

Attest: ISAAC GARMOE, *Secretary.*

In presence of—

M. P. HAWKINS.
HENRY L. MARTIN.

66 STATE OF MINNESOTA, } ss:
County of Hennepin, }

District Court, Fourth Judicial District.

HENRY A. GARDNER, Plaintiff,
vs.
MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, WILLIAM L. Bull, August Belmont, Edwin Hawley, Richard B. Hartshorne, F. B. Olcott, W. A. Read, William Strauss, J. Kennedy Tod, and William D. Washburn, Defendants.

For its separate answer to the amended complaint herein, the Minneapolis & St. Louis Railway Company respectfully shows unto the court and alleges:

1. It admits the allegations of the first and second divisions of said amended complaint, and the allegations contained in the third division of said amended complaint commencing with the words "but that," in the sixth line of said third division, and extending to the end of said third division; but denies the remaining allegations contained in said third division.

2. It admits the allegation of the fourth division of the said amended complaint, except that portion of the ninth paragraph of the fourth division of said amended complaint, which alleges
67 the improvement and equipment mortgage "did not in any way convey or cover, and was not in any way a lien upon that portion of the railway of said Minneapolis & St. Louis Railway Company extending from Winthrop, Minnesota, to Morton, Minnesota." On the contrary, this defendant alleges the fact to be, that said improvement and equipment mortgage did convey and cover, and was a lien upon that portion of the railway of said Minneapolis & St. Louis Railway Company extending from Winthrop, Minnesota, to Morton, Minnesota.

A copy of said improvement and equipment mortgage is hereto attached and is made a part of this answer.

3. At the time said improvement and equipment mortgage was executed, to wit, on the 12th day of October, 1882, that portion of the railway of said Minneapolis & St. Louis Railway Company between Winthrop and Morton was not fully constructed, but was projected, and the same was constructed and completed during the years 1882 and 1883. By the said improvement and equipment mortgage, the said Minneapolis & St. Louis Railway Company did specifically grant, bargain, sell, assign, set over, transfer and pledge unto the Central Trust Company of New York, the trustee of said mortgage, and its successors in said trust, and to its or their assigns, all the railways, property, equipment, and franchises at that date owned and acquired by the said Minneapolis & St. Louis Railway Company, or thereafter to be by it owned, or in any manner acquired, and the portion of said Minneapolis & St. Louis railway between Winthrop and Morton was included in
68 and embraced by said grant. Said mortgage also conveys, mortgages, transfers and pledges, all the lands, real estate,

grants, ways, rights of way, licenses and easements of said Minneapolis & St. Louis railway then owned, or thereafter acquired, upon which its railways were, at that time, or afterwards, situated, and which were then or subsequently connected with the railway then owned and possessed by said Minneapolis & St. Louis Railway Company, and which were or subsequently became necessary, useful or convenient for the use, maintenance and operation of its railways. Said mortgage also provided that it should be a lien, and should include and mortgage all rolling stock, equipment and property of every name and nature purchased and paid for, in whole or in part, directly or indirectly, from the proceeds of the bonds issued under the provisions of said mortgage, whether said purchase or payment be by the use of said bonds, in specie, or by way of sale and applications of the proceeds. All the line of railway between Winthrop and Morton, including the right of way, ties, rails, labor and all material used in the construction thereof, was wholly paid for from the proceeds of the sale of bonds secured by said improvement and equipment mortgage.

The portion of the line of said railway between Winthrop and Morton was a continuation and extension of the railway of said Minneapolis & St. Louis Railway Company previously constructed, and upon its construction became and was a part and portion thereof, and was connected therewith, and was necessary,
69 useful and convenient for the use, maintenance and operation of the railways previously constructed and specifically mortgaged. Said railway between Winthrop and Morton was not a separate or independent division or part of the railway of the Minneapolis & St. Louis Railway Company, but was a necessary extension or part thereof, and was intended to be included, and was included, in said mortgage.

Said Minneapolis & St. Louis Railway Company is authorized by its charter to mortgage future-acquired property. It is authorized by its charter to mortgage any portion of its road constructed or to be constructed from the proceeds of said improvement and equipment mortgage, and all property in present possession or thereafter acquired. Said improvement and equipment mortgage covered, included and mortgaged all the property of said Minneapolis & St. Louis Railway Company, including that portion of the railway between Winthrop and Morton.

4. Defendant admits the allegations of the fifth, sixth and seventh divisions of said amended complaint.

5. The defendant denies each and every allegation contained in ninth division of said amended complaint, and alleges that that portion of the Minneapolis & St. Louis railway extending from Winthrop to Morton was ordered to be sold by the said court in said foreclosure action. That the same was advertised to be sold, and was in fact sold and delivered to the purchaser, and the title of said purchaser was confirmed in and by the final decree entered in said foreclosure suit.

70 Defendant further says, that it is true that the indebtedness secured by the said improvement and equipment mort-

gage was fully paid and satisfied, but the same was so paid and satisfied by the sale and delivery to the purchaser of all the property included in said mortgage, which included and embraced that portion of the line between Winthrop and Morton, and not otherwise, and that said mortgage was so fully paid and satisfied only by reason of the fact that the portion of the line referred to was included in said sale and passed to the purchaser thereunder, and constituted a portion of the consideration for which the purchase-money was paid.

6. The allegations of the tenth division of the said amended complaint are true.

7. Answering the eleventh division of said amended complaint, defendant says: It is true that at the time said receiver delivered the property and rights before mentioned, and sold, as aforesaid, unto said The Minneapolis & St. Louis Railroad Company, said receiver also delivered unto said railroad company, and said railroad entered into possession of, and has ever since held and operated that portion of the line of railway of said Minneapolis & St. Louis Railway Company extending from Winthrop to Morton; but it is not true that no conveyance of said portion of said railway from Winthrop to Morton, or any interest therein, has ever been made to the Minneapolis & St. Louis Railroad Company, nor is it true that said railroad company has been wrongfully in possession of and enjoying the same. On the contrary, the said The Minneapolis & St. Louis Railroad Company is the owner thereof, under and
71 by virtue of the said foreclosure sale, as hereinbefore set forth.

8. It is true that said receiver of the Minneapolis & St. Louis Railway Company no longer has any portion of the railway property, franchises, rights or assets of said Minneapolis & St. Louis Railway Company in his hands, the same having been sold, by the sheriff of Hennepin county, under said decree and foreclosure, as hereinbefore set forth; and delivered by said receiver to the purchaser, pursuant to said decree and sale.

9. As to the allegations of the twelfth division of said amended complaint, this defendant says that it has neither knowledge nor information sufficient to form a belief.

10. The defendant admits the recovery of the judgment by Revilo F. Parshall on the 27th day of December, 1887, and alleges that the suit, in which said judgment was recovered by said Revilo F. Parshall against this defendant, was one brought by said Parshall on account of personal injury alleged to have been received by reason of negligence on the part of said defendant.

11. The allegations of the sixteenth division of said amended complaint are true. It is true, also, that said Minneapolis & St. Louis Railway Company is wholly insolvent. The defendant admits the allegations of the eighteenth and nineteenth divisions of said amended complaint.

12. Defendant, for answer to the twentieth, twenty-first, twenty-second and twenty-third divisions of said amended complaint, ad-

mits that the persons named in said divisions, together with
72 divers other persons, copartnerships and corporations to the plaintiff unknown, were, prior to the 2d day of November, 1894, shareholders in defendant railway company; but alleges that on the 2d day of November, 1894, said shareholders, named in said amended complaint, together with a large number of other shareholders of defendant railway company, surrendered their shares of stock; and said shares of stock, so surrendered, were thereupon cancelled and retired; and that since said 2d day of November, 1894, said shareholders, named in said amended complaint, have not been owners or holders of any shares in said defendant railway company. Defendant admits the allegations contained in the twenty-fourth division of said amended complaint.

13. The defendant denies each and every allegation of the said amended complaint not hereinbefore specifically admitted.

Further answering, this defendant respectfully shows unto the court, that the said Revilo F. Parshall, the assignor of the plaintiff herein, was a party defendant to the said foreclosure suit wherein Henry Seibert, trustee, was plaintiff, and The Minneapolis & St. Louis Railway Company, and others, were defendants. That said Revilo F. Parshall duly appeared in said cause and filed an answer therein, wherein and whereby the said Revilo F. Parshall prayed this court to grant the same relief which is asked in this amended complaint by his assignee, the said Henry A. Gardner. That in said action, and by his answer, the said Revilo F. Parshall, for himself and on behalf of all the creditors of the defendant corporation,
prayed this court, in said case, to sequestrate all the stock,
73 property, things in action and effects of the defendant corporation, and appoint a permanent receiver of the same, superseding the receiver previously appointed by this court; and all the stock, property, things in action and effects of the defendant corporation be sold and converted into money, and the proceeds thereof justly distributed in the payment of the debts of said corporation, and for other relief. That it was duly adjudicated in said action, that said Parshall was not entitled to the relief prayed for in said answer, and an order was duly made denying said application, from which said order no appeal was by said Parshall ever taken.

That at the time of the commencement of said action, Henry Seibert, trustee, plaintiff, *vs.* The Minneapolis & St. Louis Railway Company and others, defendants, in which said action the said Revilo F. Parshall was a defendant, W. H. Truesdale, the receiver duly appointed by said court on the 28th day of June, 1888, took actual, open and visible possession of all the property included in said improvement and equipment mortgage, including that portion of the said line of railway between Winthrop and Morton, and at all times thereafter, up to and including the 31st day of October, 1894, to wit, for more than six years, said receiver continued and was in actual, open and visible possession of all said mortgaged property, including that portion between Winthrop and Morton, by virtue of the said mortgage and the power therein.

That during all of said period of more than six years sub-
74 sequent to June 28th, 1888, the said receiver, with full notice to and with the full knowledge of the said Revilo F. Parshall, plaintiff's assignor, held open, notorious, and visible possession of the portion of this defendant's line of railway between Winthrop and Morton, as a part of the property included in and mortgaged by said improvement and equipment mortgage, and as a part of the security for the debts secured thereby; and during all of said period of more than six years, all the earnings of said railroad property, including the portion between Winthrop and Morton, were paid into this court as earnings of the mortgaged property, and *was*, under the orders of this court from time to time made, applied to the payment of the expenses of said receivership, the payment of interest upon the bonds secured by said improvement and equipment mortgage and other mortgages upon said property, and to the payment of such claims against the Minneapolis & St. Louis Railway Company as were properly payable from said receiver's fund; and during all of said time, the said property was administered and operated by this court as a part of the property mortgaged and included in the mortgage in process of foreclosure in said suit brought by said Seibert, trustee, to which suit this plaintiff's assignor was a party, as this plaintiff well knew during all of said period of more than six years.

Plaintiff and his assignor have at all times since June 28th, 1888, and prior to October 31st, 1894, known and had notice, actual and constructive, that the mortgagee, trustee, of the said improvement and equipment mortgage, had caused said railway property
75 between Winthrop and Morton to be taken in possession by said receiver as a part of said property mortgaged; and that said receiver was holding said property to be disposed of and sold under foreclosure in said action, and that it was the purpose and object of said foreclosure suit to cause all the property of said Minneapolis & St. Louis Railway Company, including the property between Winthrop and Morton, to be sold at foreclosure sale to satisfy said improvement and equipment mortgage.

Notwithstanding the plaintiff herein, and his assignor, knew that said Minneapolis & St. Louis Railway Company was insolvent, and that all its property and franchises had been placed in the hands of a receiver, and notwithstanding said plaintiff had notice and knowledge of all the matters hereinbefore set forth, the plaintiff and his assignor, during said period between June 28th, 1888, and October 31st, 1894, neglected, failed and refused to take any steps to enforce said claim against said Minneapolis & St. Louis Railway Company, by making application to the court by which said receiver was appointed for an order requiring said receiver to pay said judgment out of the money in the hands of said receiver, or out of the earnings of the property, or otherwise.

That at the time said Revilo F. Parshall entered an appearance in said foreclosure suit, and filed said petition and asserted his claim, under said judgment, there was in the hands of said receiver large sums of money properly applicable to the payment of just

debts against the said Minneapolis & St. Louis Railway Company but said plaintiff and his grantor wholly failed to take any
76 steps or make any attempt to procure the payment and satisfaction thereof. Said plaintiff and his assignor have during all of said time, between June 28th, 1888, and October 31st, 1894, knowing that said property between Winthrop and Morton was held by said receiver as a part of the property included in said improvement and equipment mortgage, and was being operated and administered by said receiver under said mortgage, pursuant to the orders of said court, neglected, failed and refused to assert or enforce the lien of said judgment, or to ask the payment thereof from the funds in the hands of said receiver; and have knowingly permitted the said property between Winthrop and Morton to be seized and possessed by said receiver as a part of the mortgaged property, and to be operated and administered as such; and have knowingly permitted the same to be sold under foreclosure and as a part of the mortgaged property included in said improvement and equipment mortgage, and delivered to the purchasers, and the title thereto confirmed in said purchaser by final decree (a copy of which decree is hereto attached and hereby made a part hereof); and during all of said term and time between June 28th, 1888, and October 31st, 1894, the plaintiff and his assignor have acquiesced in the possession of said receiver, and the operation, administration and sale of said property, without objection or protest; and said plaintiff and his assignor have, during all of said time, negligently and carelessly failed to assert any claim of priority or lien, or any lien under said judgment, or to assert any claim, or payment
77 thereof, against the funds in the hands of said receiver. And the defendant says that, by reason of the laches and negligence of said plaintiff, and his assignor, in failing to assert said claim and lien, and by reason of the acts and conduct, and silence or conduct of said plaintiff, as hereinbefore set forth, the plaintiff is estopped to assert any claim to a lien upon any portion of the property referred to or described in the said amended complaint prior or superior to the lien of said improvement and equipment mortgage, or prior or superior to the title of the purchasers under said foreclosure sale.

Further answering, this defendant says that the property formerly owned by the said Minneapolis & St. Louis Railway Company is encumbered by a mortgage, executed by the present owner thereof, the Minneapolis & St. Louis Railroad Company, on the 2d day of November, 1894, and a supplementary mortgage dated January 8th, 1895, made to secure bonds to the amount of ten millions of dollars, of which five million, two hundred and eighty-two thousand have been issued and sold and are now outstanding, which said mortgages specifically include, embrace and mortgage that portion of the line of railway hereinbefore referred to as being located between Winthrop and Morton. Said mortgages, last referred to, were executed and delivered prior to the commencement of this suit, and were executed in good faith, without notice or knowledge of plaintiff's claim that said property was not included or embraced in said

improvement and equipment mortgage and said foreclosure sale; and the same were executed and delivered to the Central Trust
78 Company, of New York, the trustee named therein, with the understanding and belief on the part of both mortgagor and mortgagee that the portion of the line referred to was included in said improvement and equipment mortgage and passed by said foreclosure sale; and relying upon the final decree of this court confirming the title thereto in the purchaser; and the said The Minneapolis & St. Louis Railroad Company, the said mortgagor, was in actual possession of said property and operating the same at the time of the execution of said mortgages. The bonds secured by said last-named mortgages, which are subject in terms to certain other mortgages upon said property, were sold by said trustee and purchased by the holders thereof with the knowledge and understanding, and relying upon the fact that they were secured by mortgage upon that part of the railway between Winthrop and Morton.

The plaintiff and his assignor, by remaining silent and permitting said property to be possessed, administered and operated by the said receiver for more than six years, and by failure to assert any claim or lien thereon in the answer of said Revilo F. Parshall, filed in said foreclosure suit, and permitting the railway to be sold under said foreclosure, and delivered to the purchaser without objection and without asserting any lien thereon or claim thereto, as against the holders of the improvement and equipment mortgage, have been negligent and are estopped from asserting any claim thereto.

Defendant further says, that the said improvement and
79 equipment mortgage was executed many years prior to the time when plaintiff's cause of action against the Minneapolis & St. Louis Railway Company accrued, and was intended and understood by both mortgagor and mortgagee to cover and include the line between Winthrop and Morton. Said mortgage was construed in this court, in said foreclosure suit, to include said line between Winthrop and Morton, and the sale made pursuant to the decree in said foreclosure case was construed by this court to include said line between Winthrop and Morton; and said decree and adjudication is binding upon the plaintiff, his assignor, said Revilo F. Parshall, having been a party defendant in the action in which said judgment and decree were rendered.

Wherefore, this defendant prays that the plaintiff may take nothing by his said action, and that the defendant may have his costs.

ALBERT E. CLARKE AND
W. F. BOOTH,
Attorneys for Defendant,
1104 *Guaranty Loan Building, Minneapolis, Minn.*

STATE OF MINNESOTA, }
County of Hennepin, } ss:

Albert E. Clarke, being duly sworn, says that he is attorney for the defendant, The Minneapolis & St. Louis Railway Company, in the above-entitled action; he has read the foregoing answer and

knows the contents thereof; that the same is true to the best of his knowledge, information and belief; and the reason why this
80 verification is not made by an officer of said defendant is that all the officers of said defendant are absent from said county of Hennepin, where resides this affiant, its attorney.

ALBERT E. CLARKE.

Subscribed and sworn to before me this 16th day of June, 1896.

W. F. BOOTH,

[NOTARIAL SEAL.] *Notary Public, Hennepin County, Minn.*

(Filed Nov. 19th, 1896.)

STATE OF MINNESOTA, *County of Hennepin.*

District Court, Fourth Judicial District.

HENRY A. GARDNER, Plaintiff,

vs.

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, WILLIAM L. Bull, August Belmont, Edwin Hawley, Richard B. Hartshorne, F. P. Olcott, William A. Read, J. Kennedy Tod, William Strauss, and William D. Washburn, Defendants.

The defendants, William Strauss, William L. Bull, Richard B. Hartshorne and Edwin Hawley, for answer to the amended complaint in the above-entitled action, say:

1. They admit the allegations of the first and second divis-
81 ions of said amended complaint, and the allegations contained in the third division of said amended complaint commencing with the words "but that," in the sixth line of said third division, and extending to the end of said third division; but deny the remaining allegations contained in said third division.

2. They severally admit the allegations of divisions five, six, seven, eight, ten, sixteen, seventeen, eighteen and nineteen of said amended complaint; and further, admit the recovery of the judgment by Revilo F. Parshall on the 27th day of December, 1887, mentioned in the thirteenth division of said amended complaint; and allege that said judgment was recovered by the said Parshall in an action brought by him against the said defendant railway company to recover for personal injuries alleged to have been received by him by reason of negligence on the part of said defendant railway company.

3. These defendants severally admit the allegations of the fourth division of said amended complaint, except the allegation embodied in the ninth paragraph of said fourth division, to the effect that the improvement and equipment mortgage did not include, convey or cover, and was not a lien upon that certain portion of the Minneapolis & St. Louis railway between Winthrop and Morton, which allegation these defendants deny; and allege the fact to be that the portion of said railway referred to was included in and covered by

said improvement and equipment mortgage and subject to the lien thereof.

4. These defendants severally admit *that* the allegations
82 in the eleventh division of said amended complaint, that at the same time that said receiver delivered said property and rights, sold under and by virtue of the decree of foreclosure of *of* the improvement and equipment mortgage unto the said The Minneapolis & St. Louis Railroad Company, said receiver also delivered unto said railroad company, and said railroad company entered into possession thereof, and has ever since held, operated and enjoyed that portion of the line of railway of said defendant, The Minneapolis & St. Louis Railway Company, extending from Winthrop to Morton, in the State of Minnesota.

5. As to the allegations of the fourteenth and fifteenth divisions of the said complaint, these defendants severally say that they have no knowledge as to the truth of the allegations therein contained, nor have they any information sufficient to form a belief as to the truth of such allegations, and, therefore, deny the same.

6. These defendants severally deny each and every allegation of the complaint not hereinbefore specifically admitted or denied on information and belief.

7. The defendants severally, for answer to the twentieth, twenty-first, twenty-second and twenty-third divisions of said amended complaint, admit that the persons named in said divisions, together with divers other persons, copartnerships and corporations to the plaintiff unknown, were, prior to the 2d day of November, 1894, shareholders in defendant railway company; but allege that on the 2d day of November, 1894, said shareholders named in said amended complaint, together with a large number of other shareholders
83 of defendant railway company, surrendered their shares of stock; and said shares of stock, so surrendered, were thereupon cancelled and retired; and that since said 2d day of November, 1894, said shareholders, named in said amended complaint, have not been the owners or holders of any shares in said defendant railway company.

Defendants severally admit the allegations contained in the twenty-fourth division of said amended complaint.

These defendants severally and each deny that they are, under the constitution and laws of the State of Minnesota, liable to contribute to the plaintiff's said judgment a sum equal to the par value of the shares of stock held by them individually, or in any other sum, amount or proportion whatever.

That the said Minneapolis & St. Louis Railway Company was incorporated prior to the adoption or enactment of the constitutional provisions and statutes referred to. That said Minneapolis & St. Louis Railway Company was incorporated in the year 1853, under and pursuant to the provisions of chapter 66, of the special laws enacted by the legislature of the Territory of Minnesota, in the year 1853, under and by the name of the Minnesota Western Railroad Company, and which name was subsequently changed to the Min-

neapolis & St. Louis Railway Company, substantially as set forth in the first division of said complaint.

That the liability of the stockholders of said Minneapolis & St. Louis Railway Company was fixed by said act of incorpora-
84 tion, and not otherwise; and that the constitutional provision and *and* laws referred to in the complaint are not applicable to or binding upon these defendants in that behalf.

For further answer and defense, these defendants, each for himself, severally, says that the plaintiff's cause of action against these defendants, as stockholders of the Minneapolis & St. Louis Railway Company, is barred by the statute of limitations of Minnesota, as embodied in section 5136, of the General Statutes of 1894, and the provisions of section 6, chapter 66, of the General Statutes of 1878.

Wherefore, these defendants, and each of them, prays that he may go hence with costs.

ALBERT E. CLARKE AND
W. F. BOOTH,
Attorneys for Defendants, 1104 *Guaranty Loan Building, Minneapolis, Minn.*

STATE OF MINNESOTA, } ss:
County of Hennepin, }

Albert E. Clarke, being duly sworn, says that he is attorney for William Strauss, William L. Bull, Richard B. Hartshorne and Edwin Hawley, defendants in the above-entitled action; he has read the foregoing answer, and knows the contents thereof; that the same is true to the best of his knowledge, information and belief; and the reason why this verification is not made by the above-named
85 defendants is that they are absent from the said county of Hennepin, wherein resides the affiant, their attorney.

ALBERT E. CLARKE.

Subscribed and sworn to before me this 16th day of June, 1896.

W. F. BOOTH,
[NOTARIAL SEAL.] *Notary Public, Hennepin County, Minn.*

(Filed April 23, 1897.)

STATE OF MINNESOTA, }
County of Hennepin. }

District Court, Fourth Judicial District.

HENRY A. GARDNER, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, WILLIAM L. BULL, AUGUST BELMONT, EDWIN HAWLEY, RICHARD B. HARTSHORNE, F. P. OLCOTT, W. A. READ, WILLIAM STRAUSS, J. KENNEDY TOD, and WILLIAM D. WASHBURN, Defendants.

Amendment to the separate answer of the defendants William Strauss, William L. Bull, Richard B. Hartshorne, and Edwin Hawley.

Now comes the defendants, William Strauss, William L. Bull, Richard B. Hartshorne and Edwin Hawley, and for amendment to their separate answer to the amended complaint, allege:

86 1. Neither the plaintiff, Henry A. Gardner, nor his assignor, Revilo F. Parshall, have ever at any time been residents or citizens of the State of Minnesota; but, on the contrary, the said Henry A. Gardner and Revilo F. Parshall have always and at all times been non-residents of said State, said Henry A. Gardner being and having at all times herein referred to been a citizen and resident of the State of Illinois, and said Revilo F. Parshall having at all times referred to in the pleadings in this cause been a resident of the States of Wisconsin and Illinois.

2. The defendants, William Strauss, William L. Bull, Richard B. Hartshorne and Edwin Hawley have been at all times and now are residents of the State of New York, and never have been, nor have either of said defendants been, at any time a resident of said State of Minnesota.

3. It is the statute law of the State of New York, and is provided by the general statutes of said State of New York, as follows: SEC. 380. "The following actions must be commenced within the following periods, after the cause of action has accrued."

SEC. 382. Within six years.

1. An action upon a contract obligation or liability, express or implied, except a judgment or sealed instrument.

2. An action to recover upon a liability created by statute, except a penalty or forfeiture.

ALBERT E. CLARKE AND
W. F. BOOTH,
Attorneys for Defendants.

Dated October 9th, 1896.

87 STATE OF MINNESOTA, }
County of Hennepin, } *ss:*

Albert E. Clarke, being duly sworn, says that he is the attorney for the defendants in the above-entitled action; that he has read

the foregoing amendment to the answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; and that the reason why this verification is not made by one of the defendants is, that said defendants are each and all absent from the county of Hennepin, said State of Minnesota, wherein resides this affiant, their said attorney.

ALBERT E. CLARKE.

Subscribed and sworn to before me by said Albert E. Clarke on this 9th day of October, 1896.

W. F. BOOTH,

[SEAL.] *Notary Public, Hennepin County, Minn.*

(Served October 9th, 1896.)
(Filed November 16th, 1896.)

(Title of Action.)

Reply.

And now comes said plaintiff above named, Henry A. Gardner, and for his reply to the answer of the defendant, The Minneapolis & St. Louis Railway Company, to the amended complaint of said plaintiff herein, respectfully shows unto the court and says:

88 1. Plaintiff has no knowledge or information sufficient to form a belief as to whether the copy of said improvement and equipment mortgage attached to said answer is a true copy of the original of said mortgage.

2. Plaintiff admits that at the time said improvement and equipment mortgage was executed, to wit: on the 12th day of October, 1892, that portion of the railway of said Minneapolis & St. Louis Railway Company between Winthrop and Morton was not fully constructed, but was projected; but plaintiff admits and alleges that said portion of said line of railway had at that time been definitely located, and that the greater part of the right of way therefor between Winthrop and Morton had been contracted for, purchased or otherwise acquired, and partially graded by said Minneapolis & St. Louis Railway Company, and that said portion of said line was completed and the operation thereof commenced by said Minneapolis & St. Louis Railway Company on or prior to the first day of January, 1883.

3. Plaintiff admits that said mortgage provided that it should be a lien upon and should include and mortgage all rolling stock, equipment and property of every name and nature purchased and paid for, in whole or part, directly or indirectly, from the proceeds of the bonds issued under said mortgage, whether said purchase or payment were made by the use of said bonds in specie or by way of sale of said bonds and application of the proceeds. But plaintiff denies that the portion of said line of railway of said Minneapolis &

89 St. Louis Railway Company, situate between Winthrop and Morton was paid for, in whole or in part, directly or indirectly, from the proceeds of the sale of the bonds secured by said improvement and equipment mortgage.

4. Plaintiff admits that the portion of the railway of said Minneapolis & St. Louis Railway Company between Winthrop and Morton was a continuation and extension of the railway of said Minneapolis & St. Louis Railway Company previously constructed, and was connected therewith; but denies that the same was necessary for the use, maintenance or operation of the railway previously constructed or owned by said Minneapolis & St. Louis Railway Company, and specifically mortgaged by said improvement and equipment mortgage; although plaintiff admits that the same was useful and convenient in the use, maintenance and operation of said railway.

Plaintiff admits that said railway between Winthrop and Morton was not operated by said Minneapolis & St. Louis Railway Company as a separate and independent division of the railway of said Minneapolis & St. Louis Railway Company, but denies that it was a necessary extension or part thereof, and expressly denies that it was the intention of the parties to said improvement and equipment mortgage that the same should be included in said mortgage, and denies that the same was in fact included in said mortgage.

5. Plaintiff admits that said Minneapolis & St. Louis Railway Company is authorized by its charter to mortgage future-acquired property, including any portion of its road, and all property in present possession or thereafter acquired; and that said Minne-
90 apolis & St. Louis Railway Company had such authority at the date of the execution of said improvement and equipment mortgage.

6. Plaintiff admits that the action wherein the judgment recovered by said Revilo F. Parshall, plaintiff's predecessor in interest, against said Minneapolis & St. Louis Railway Company was rendered was one brought by said Parshall to recover damages on account of personal injuries sustained by said Parshall, by reason of negligence on the part of said defendant.

7. Plaintiff has no knowledge or information sufficient to form a belief as to whether on the 2nd day of November, 1894, or at any time, said defendant shareholders named in said answer of said railway company to said amended complaint surrendered, or attempted to surrender, their shares, or any of their shares of stock in said Minneapolis & St. Louis Railway Company, or as to whether said shares of stock, or any thereof, were thereafter cancelled or retired.

But plaintiff expressly alleges that if any such surrender, cancellation or retirement of the stock of said defendant railway company was ever made, it was made long subsequently to the entry of the judgment of said Revilo F. Parshall, in plaintiff's amended complaint herein mentioned, and while said judgment was in full force and was made with actual and constructive knowledge on the part of, and notice to, the shareholders in said railway company so surrendering said stock in said defendant railway company, that said railway company was then and there wholly insolvent and
91 was liable upon a large amount of indebtedness, including said judgment, and for the purpose of evading the liability of said shareholders here sought to be enforced, and that the sur-

render, cancellation and retirement of said stock, if they occurred, were wholly ineffectual to affect the rights of this plaintiff and of plaintiff's predecessor in interest, said Parshall, or the relations theretofore existing between this plaintiff or his said predecessor in interest and said defendant shareholders.

8. Plaintiff admits that said Revilo F. Parshall, the assignor of the plaintiff herein, was a party defendant to said foreclosure suit wherein said Henry Seibert, trustee, was plaintiff, and The Minneapolis & St. Louis Railway Company and others were defendants; but plaintiff alleges that said Parshall was made such defendant under a wrong name and was never served with process in said action; that said Parshall appeared for the first time in said action and filed an answer therein upon the 7th day of October, 1892; that said answer was filed under the authority of an order of said court wherein said foreclosure action was pending, wherein and whereby it was provided that the allegations of said answer should be taken and considered as controverted by any party to the action who might desire to traverse or avoid such allegations as fully as could be done by pleading on the part of any such parties; that in and by said answer said Parshall demanded relief as follows, and none other, viz:

"Wherefore, for himself and in behalf of all the creditors of the defendant corporation, especially such as come in and con-
92 tribute to the expenses thereof, and they are numerous, widely distributed and difficult to ascertain, this defendant demands judgment and prays the decree of this court:

1. That pursuant to the statute in such case made and provided, this court sequestrate all the stock, property, things in action and effects of the defendant corporation and appoint a permanent receiver of the same superseding the receiver heretofore appointed in this action and his receivership.

2. That the stock, property, things in action and effects of the defendant corporation be sold and converted into money and the proceeds thereof justly distributed as far as may be in the payment of its just debts.

3. That, to that end, by its interlocutory decree or order, this court appoint a permanent receiver of all the stock, property, things in action and effects of the defendant corporation, superseding the receiver heretofore appointed herein, and his receivership, and direct the said defendant corporation and said William H. Truesdale, now receiver as aforesaid, by an instrument in writing to be approved by this court, or a judge thereof, good and sufficient to vest in said permanent receiver the legal title thereof, to convey, grant and assign to such permanent receiver, his successors and assigns, all the stock, property, things in action and effects of the defendant corporation, wherever situate, now under the care, custody or control of said William H. Truesdale, receiver, or otherwise; and direct the defendant corporation and said William H. Truesdale, receiver, to discover all such property, stock, things in action and effects
93 and to deliver the same to, and put the same in the possession of such permanent receiver, and, by a reference or oth-

erwise, as to this court shall seem proper, provide for the marshalling of the assets of the defendant corporation, the ascertainment of the creditors thereof, and its just debts, due or to become due, and the amount and priority thereof, and when the same became or will become due, and, if secured, how secured; and provide for a proper notice to the creditors of the defendant corporation, that they may be the more effectually bound by the judgment herein.

4. That this defendant recover his attorneys' fees, costs, and the disbursements herein payable out of the first moneys that come to the hands of said permanent receiver, and have such other and further order, judgment, decree or relief, as to this court shall seem right and proper, and consonant with equity and good conscience."

That upon the same day upon which said answer was filed by said Parshall, the attorneys for said Parshall served and filed a notice of motion in said foreclosure action, wherein and whereby said attorneys notified the other parties to said action that they would apply to said court wherein said action was pending for an order or interlocutory decree to be made and entered by said court in said action, whereby said court should sequestrate the stock, property, things in action and effects of said defendant corporation, The Minneapolis & St. Louis Railway Company, and appoint a receiver of the same superseding the receiver therefor theretofore appointed in said action, and should require said defendant
94 corporation and the receiver thereof theretofore appointed to convey and assign to such new receiver so to be appointed all the stock, property, things in action and effects of said defendant corporation, and should require said receiver of said defendant corporation theretofore appointed to discover all such property, stock, things in action and effects and to deliver the same and put the same in possession of such receiver, to be appointed as aforesaid; that thereafter said motion was brought on for hearing before said court; that at the time said answer of said Parshall was filed in said foreclosure action all, or substantially all, of the testimony in said foreclosure action had been taken before the court in which the same was pending, and at the time said motion was brought on for hearing, as aforesaid, all the testimony in said action had been so taken and the court had made and filed its findings of fact thereon, but had not yet made or filed its conclusions of law in said action; that said motion, having been heard before said court, said court denied the same, upon the ground that said action having reached the stage which it then had reached, it would be improper for said court to grant the relief asked for by said motion upon an interlocutory application; that thereafter none of the issues raised by said Parshall's said answer were ever tried or any decision or judgment tendered thereon; that said defendant Parshall was not, nor were any of his rights, foreclosed by the final decree or any decree entered in said action, either in form or otherwise; that said Parshall was not granted either in or by the
95 decree of sale entered in said action, or in or by the final decree entered therein, the right to redeem the property of said Minneapolis & St. Louis Railway Company, ordered to be sold

in said action, or any part thereof, from said sale, and that neither said final decree nor said decree of sale, or any other order or decree, entered in said foreclosure action, either in form or otherwise, purported to affect either favorably or adversely, any of the rights of said Parshall except as hereinabove stated. And plaintiff expressly denies that it was duly or in any manner adjudicated in said action that said Parshall was not entitled to the relief prayed for in his said answer, and denies that any order was ever made in said action denying the application for relief contained in his said answer, except so far as said application for interlocutory relief was concerned. Plaintiff admits that said Parshall never took any appeal from the order denying his said application for interlocutory relief.

9. Plaintiff admits that that portion of said answer of said defendant railway company beginning with the words, "That at the time of the commencement of said action," in the nineteenth line of the sixth page of said answer, and concluding with the words, "and the power therein," in the thirty-first line of said page of said answer, is true.

10. Plaintiff has no knowledge or information sufficient to form a belief as to whether during all the period during which the property of said defendant railway company was in the hands of
96 a receiver, all the earnings of said railroad property, or any of the earnings of that portion thereof between Winthrop and Morton, were paid into this court, whether as earnings of the mortgaged property or otherwise, or as to whether the same were under the orders of this court, from time to time made, applied to the payment of the expenses of said receivership, the payment of interest upon the bonds secured by said improvement and equipment mortgage, and other mortgages upon said property, and to the payment of such claims against said Minneapolis & St. Louis Railway Company as were properly payable from said receiver's fund, or to any of said purposes.

11. Plaintiff has no knowledge or information sufficient to form a belief as to whether at the time said Revilo F. Parshall entered his appearance in said foreclosure suit and filed his said answer therein, there were in the hands of the receiver of said Minneapolis & St. Louis Railway Company, large sums of money properly applicable to the payment of just debts against said Minneapolis & St. Louis Railway Company.

12. Plaintiff admits that the copy of the final decree in said foreclosure action attached to the answer of said defendant railway company herein is, in the main, a copy of the final decree entered in said action, but whether the same is an accurate copy of said final decree, plaintiff has no knowledge or information sufficient to form a belief, and prays that said defendant railway company may be required to make due proof in that behalf upon the trial of this action.

13. Plaintiff has no knowledge or information sufficient
97 to form a belief as to any of the matters or things stated in that portion of said answer beginning with the words, "Further answering, this defendant says," in the sixteenth line of the

ninth page thereof, and concluding with the words, "and Morton," in the eleventh line of the tenth page of said answer, which said portion of said answer consists of allegations concerning two mortgages alleged to have been made by the Minneapolis & St. Louis Railroad Company on the 2nd day of November, 1894, and on the 8th day of January, 1895, respectively, and the issuance and negotiation of bonds thereunder, and concerning other matters alleged to be connected therewith.

14. Plaintiff admits that said improvement and equipment mortgage was executed some years prior to the time when plaintiff's cause of action against said Minneapolis & St. Louis Railway Company accrued.

15. Except as hereinbefore admitted, plaintiff expressly denies each and every allegation, matter and thing in said answer of said defendant railway company herein contained.

Wherefore, plaintiff prays judgement as in his amended complaint herein demanded.

F. W. M. CUTCHEON,
Attorney for Plaintiff, 404 *N. Y. Life Bldg., St. Paul, Minn.*

STATE OF MINNESOTA, } ss:
County of Ramsey, }

F. W. M. Cutcheon, being duly sworn, says that he is the
98 attorney for the plaintiff in the above entitled action; that he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief; that the reason why this verification is not made by the said plaintiff is that he is absent from the county of Ramsey and State of Minnesota, wherein resides this affiant, his attorney in said action.

F. W. M. CUTCHEON.

Subscribed and sworn to before me this 22d day of June, 1896.
MINNA W. WAMZER,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minn.*

(Title of Action.)

Reply.

Now comes the above-named plaintiff, Henry A. Gardner, and for a reply to the separate answer of the defendants, William Strauss, William L. Bull, Richard B. Hartshorne and Edwin Hawley, to the amended complaint of said plaintiff, in the above-entitled action, shows unto the court and says:

1. Plaintiff admits that the judgment recovered by his predecessor in interest, Revilo F. Parshall, upon the 27th day of December, 1887, as alleged in his amended complaint herein, was recovered by said Parshall in an action brought by said Parshall against said defendant railway company to recover damages for personal
99 injuries received by said Parshall, by reason of negligence on the part of said defendant railway company.

2. Plaintiff has no knowledge or information sufficient to form a belief as to the truth of any of the matters or things alleged in said amended answer, in that portion thereof beginning with the words, "but alleged," in the 6th line of the 7th subdivision thereof, and concluding with the words, "and retired," in the fourth line of the third page of said answer, to the effect that said defendant shareholders and other shareholders in said defendant railway company surrendered their stock in said company, and to said company, and that said stock was retired and cancelled by said company on or about the second day of November, 1894, and therefore denies the same. And plaintiff expressly alleges that if any such surrender, cancellation or retirement of the stock of said defendant railway company was made, it was made with actual and constructive knowledge on the part of and notice to the shareholders in said company so surrendering said stock and said defendant railway company; that said railway company was then and there wholly insolvent and was liable upon a large amount of indebtedness, and for the purpose of evading the liability of such shareholders here sought to be enforced, and that such surrender, cancellation and retirement of said stock, if they occurred, were wholly ineffectual to affect the rights of this plaintiff or his predecessor in interest, said Parshall, or the relations theretofore existing between this plaintiff, or his said predecessor in interest, and said defendant shareholders.

100 3. Plaintiff denies that said Minneapolis & St. Louis Railway Company was incorporated prior to the adoption or enactment of the constitutional provisions and the statutes referred to in the plaintiff's amended complaint herein, and alleges that said defendant, The Minneapolis & St. Louis Railway Company, was incorporated and exists under and by virtue of the act of the legislature of Minnesota, approved March 2, 1881, and entitled, "An act to amend an act entitled 'An act to incorporate the Minnesota Western Company,' approved March third (3rd), one thousand eight hundred and fifty-three (1853), and the amendatory act thereof, approved February fourth (4th), eighteen hundred and seventy (1870)," and of the consolidation agreement entered into by the Minneapolis & Duluth Railroad Company, the Minnesota & Iowa Southern Railroad Company, and the Fort Dodge & Fort Ridgely Railroad Company, and the Minneapolis & St. Louis railway, a corporation theretofore existing, as alleged in plaintiff's amended complaint herein, and not otherwise: and that said incorporation occurred and said defendant, The Minneapolis & St. Louis Railway Company, began to exist as a corporation June 1, 1881, and not previously.

4. Plaintiff expressly denies that the liability of the shareholders of said defendant, The Minneapolis & St. Louis Railway Company, was fixed by the act incorporating the same, or by any act or acts of incorporation.

5. Answering the second defense interposed by said defendant shareholders in their said answer to the cause of action stated

101 in plaintiff's amended complaint herein, plaintiff alleges that when the cause of action stated in plaintiff's amended complaint accrued against said defendant shareholders, and each of

them, each of said defendant shareholders was outside of the State of Minnesota, and that ever since said cause of action so accrued, each of said defendant shareholders has been absent from and resided outside of said State, and that each of said defendant shareholders has been absent from and resided outside of said State of Minnesota ever since a time prior to said 27th day of December, 1887.

Wherefore, plaintiff demands judgment as heretofore prayed in his amended complaint herein.

F. W. M. CUTCHEON,
Attorney for Plaintiff, 404 *New York Life Building, St. Paul, Minn.*

STATE OF MINNESOTA, } ss:
County of Ramsey, }

Frank W. M. Cutcheon, being duly sworn, says that he is the attorney for Henry A. Gardner, plaintiff in the above-entitled action; that he has read the foregoing reply and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief, and that the reason why this verification is not made by said plaintiff is, that said plaintiff is absent from said
102 county of Ramsey and State of Minnesota, wherein resides this affiant, his attorney.

FRANK W. M. CUTCHEON.

Subscribed and sworn to before me this 18th day of June, 1896.

MINNA W. WANZER,
[NOTARIAL SEAL.] *Notary Public, Ramsey County, Minn.*

(Served June 19th, 1896.)
(Filed Nov. 19th, 1896.)

(Title of Action.)

Stipulation of Facts.

It is hereby stipulated and agreed by and between the plaintiff and William L. Bull, Richard B. Hartshorne, Edwin Hawley and William Strauss, answering defendants that the following statements are true, and may be taken and considered by the court herein upon the trial, or any hearing hereof, as if established by competent and uncontradicted evidence duly received upon the trial of this said action.

The defendant, The Minneapolis & St. Louis Railway Company, is a domestic railroad corporation located within this State. During the year 1853, by an act of the legislature of the Territory of Minnesota, approved March 3rd, 1853, entitled "An act to incorporate the Minnesota Western Railroad Company," there was incorporated the Minnesota Western Railroad Company, which con-
103 tinued to be known by said name until on or about the 26th day of May, A. D. 1870, on which said day its board of directors by resolution duly adopted, and proceeding under the

authority conferred by an act approved February 4th, 1870, amendatory of said original act and entitled "An act to amend an act to incorporate the Minnesota Western Railroad Company," lawfully changed the name of said corporation to the Minneapolis & St. Louis Railway Company, by which name it was thereafter lawfully and commonly known. On or about the 20th day of April, 1881, said corporation, proceeding under and in accordance with the provisions of another act of the legislature of the State of Minnesota, approved March 2nd, 1881, and entitled "An act to amend an act entitled 'An act to incorporate the Minnesota Western Railroad Company,' approved March third (3rd), one thousand eight hundred and fifty-three (1853), and the act amendatory thereof, approved February fourth (4th), eighteen hundred and seventy (1870)," did duly enter into an agreement with certain other corporations, to wit: the Minneapolis & Duluth Railroad Company, the Minnesota & Iowa Southern Railroad Company and the Fort Dodge & Fort Ridgely Railroad Company, by and under the terms of which all said corporations above mentioned agreed to make a full and complete consolidation and amalgamation of all said corporations and their respective stocks, franchises, property, earnings and management, in accordance with the provisions of said act of March 2nd, 1881, under the name of the Minneapolis & St. Louis Railway Company, which said agreement was to and did
104 take effect June 1st, 1881. Thereafter said companies filed their said articles of consolidation as provided by said act of the legislature of Minnesota of March 2nd, 1881, a copy of which said agreement and articles of consolidation is hereto attached, marked Exhibit "A," and made a part hereof. Thereafter, and on or about said June 1st, 1881, said consolidation was duly consummated, each of said constituent companies in form conveying and transferring unto said consolidated corporation their respective stocks, franchises, rights, property and earnings, in accordance with the provisions of said act of March 2nd, 1881. Thereafter said consolidated company entered upon, and ever after until the second day of November, 1894, enjoyed the franchises, rights, property and earnings of its said constituent corporations conveyed as aforesaid. Said consolidated corporation is the defendant corporation, The Minneapolis & St. Louis Railway Company, above named.

Said defendant corporation, The Minneapolis & St. Louis Railway Company, was invested, by said acts above mentioned and the laws and statutes of said Territory and State of Minnesota, with the usual and general powers of a body incorporate, and especially was empowered to construct, maintain and operate a railroad with a single or double track from Stillwater on Lake St. Croix, to the city of St. Anthony, on the Mississippi river, both in Minnesota, and thence across said river to the city of Minneapolis, in said State, to a convenient point of junction with the Mississippi Valley railroad or the Hastings & Dakota railroad, or both, besides eight branches.

105 Said Minneapolis & St. Louis Railway Company did not, nor did its constituent company, known first as the Minne-

sota Western Railway Company, and afterwards as the Minneapolis & St. Louis Railway Company, take any steps towards constructing or acquiring any line of railway until after the 6th day of March, 1869, unless the proceedings next hereinafter recited, which were had, constitute such steps: Said Minnesota Western Railroad Company, afterwards known as the Minneapolis & St. Louis Railway Company, in November, 1853, published in the Weekly Minnesotean, a newspaper published in St. Paul, a notice that books for receiving subscriptions to the capital stock of said Minnesota Western Railroad Company would be opened in St. Paul and New York on the 26th day of December, 1853, and kept open for thirty days from that date. Said books were opened and kept open in accordance with said notice. On December 6th, 1853, at a meeting of the incorporators of said Minnesota Western Railroad Company held at St. Paul, Franklin Steele was authorized to receive payment of $5.00 per share upon the capital stock of said railroad company, to be paid at the time of subscribing, as required by the act of incorporation of said railroad company.

On December 26th, 1853, $100,000 of the stock of said company having been subscribed, a notice was given of a meeting of the stockholders of said company to be held at St. Paul January 27th, 1854, for the purpose of choosing nine directors of said company, which notice was published in said Weekly Minnesotean.
106 Said meeting was held at the time and place appointed and the nine directors elected. At said meeting 1,740 shares of the capital stock of said company were represented. The corporate organization of said railroad company was kept up from that time until the organization of the consolidated company above mentioned.

On and prior to the 28th day of June, A. D. 1888, said defendant, The Minneapolis & St. Louis Railway Company, owned and operated a system of railroads in the States of Minnesota and Iowa, extending from Minneapolis through Hopkins, Merriam junction and Albert Lea, Minnesota, and Fort Dodge, Iowa, to Angus, in the State of Iowa, with a branch line from Hopkins, via Winthrop, Minnesota, to Morton, in said last-named State. Said railway company also owned a line of railway extending from Minneapolis to White Bear, in the State of Minnesota, which was leased to and operated by the St. Paul & Duluth Railroad Company.

On said day last mentioned, said defendant railway had executed three (3) mortgages, securing bonds theretofore issued and varying in amount, which said mortgages, and six others, were liens upon different portions of said lines of railway. Said three mortgages were the following:

1. A mortgage executed by said defendant, The Minneapolis & St. Louis Railway Company, to the Central Trust Company of New York City, commonly called the Pacific Extension mortgage, dated June first, 1881, securing outstanding bonds of the aggregate par value of one million three hundred and eighty-two thou-
107 sand dollars ($1,382,000), together with interest thereon at the rate of six (6) per cent. per annum, which said mortgage was

and still is a lien upon those portions of the railway of said defendant, Minneapolis & St. Louis Railway Company, extending from Minneapolis to Hopkins, Minnesota, and from Hopkins, Minnescta, to Morton, Minnesota.

2. Another mortgage executed by said defendant, The Minneapolis & St. Louis Railway Company, to said Central Trust Company of New York City, commonly called the consolidated mortgage, dated January second, 1882, securing outstanding bonds of the aggregate par value of one hundred and eight thousand dollars ($108,000), together with interest thereon at the rate of six (6) per cent. per annum, which said mortgage was and still is a lien upon those portions of the railway of said defendant, Minneapolis & St. Louis Railway Company, extending from Minneapolis to White Bear, in Minnesota, and from Minneapolis, via Merriam junction, to Albert Lea, Minensota, and from the southern boundary of the State of Minnesota, via Fort Dodge, Iowa, to Angus, Iowa, and from Hopkins, Minnesota, to Morton, Minnesota.

3. Another mortgage executed by said Minneapolis & St. Louis Railway Company to said Central Trust Company of New York City, commonly called the improvement and equipment mortgage, dated October 12th, 1882, securing outstanding bonds of the aggregate par value of three million eight hundred and eighty-seven thousand dollars ($3,887,000), together with interest thereon
108 at the rate of — (6) per cent. per annum, which said mortgage was a lien upon those portions of the railway of said defendant, Minneapolis & St. Louis Railway Company, extending from Minneapolis to White Bear, in Minnesota, and from Minneapolis via Merriam junction and Albert Lea, Minnesota, and Fort Dodge, Iowa, to Angus, Iowa, and from Hopkins to Winthrop, Minnesota, as well as upon all, or substantially all, the equipment and moveable property of said defendant, The Minneapolis & St. Louis Railway Company.

It is claimed by the plaintiff herein that said last-mentioned mortgage did not in any way convey or cover, and was not in any way a lien upon, that portion of the railway of said defendant Minneapolis & St. Louis Railway Company extending from Winthrop, Minnesota, to Morton, Minnesota. On the other hand, it is claimed by the defendants herein that said mortgage did cover and convey, and was a lien upon all said portion of said railway.

Each of said mortgages was on said day, and (with the exception of said improvement and equipment mortgage) still is, a lien upon the portion or portions of said railway covered by it, superior in equity to the lien of any and every mortgage subsequent to it in date.

In addition to said mortgages above described and mentioned there existed upon said 28th day of June, 1888, a number of contracts of various kinds, to wit: Construction contracts, traffic agreements, trackage agreement, leases, etc., which, upon said day, constituted liens upon the lines of said defendant, The Min-
109 neapolis & St. Louis Railway Company, superior in equity to the lien of said improvement and equipment mortgage above mentioned.

Prior to said 28th day of June, 1888, said Central Trust Company, of New York, was duly removed as trustee of the trust created by the mortgage above mentioned, known as the improvement and equipment mortgage, and Henry Seibert, of New York, was duly appointed trustee thereunder as its successor and in its place and stead, and forthwith entered upon the discharge of the duties of said trust.

On said 28th day of June, 1888, said Henry Seibert as trustee, under said improvement and equipment mortgage, duly commenced an action in this said court, wherein said Seibert as such trustee, was plaintiff, and said defendant, The Minneapolis & St. Louis Railway Company, and others were defendants, for the purpose of foreclosing said improvement and equipment mortgage, and of securing a sale in said action of all the franchises, rights, property and estates upon which the same was a lien or charge. Such proceedings were had in said action that thereafter, and on said 28th day of June, 1888, by an order of this said court, entered in said action, a receiver was appointed in aid of such foreclosure of all the property, railway, franchise, rights and estates of said defendant, The Minneapolis & St. Louis Railway Company, which said receiver forthwith qualified and thereupon took possession of all the property, railway, franchises, rights and estates of said railway company, and thereafter continued to hold and operate the same until
110 the 2nd day of November, A. D. 1894, as hereinafter stated. Said action was not in any sense a winding-up action or a sequestration, insolvency or bankruptcy proceeding. A copy of said order appointing said receiver is hereto attached and marked Exhibit "B," and made a part thereof.

Thereafter such proceedings were had in said foreclosure action that on the 29th day of June, 1893, an interlocutory decree was entered in said action whereby it was ordered and decreed that said improvement and equipment mortgage be foreclosed and that all the property, railway, franchises, rights and estates, upon which said improvement and equipment mortgage was then a lien, but none other, should be sold at judicial sale, at the time and in the manner therein provided, in case no redemption thereof should be made as therein provided. No redemption of said property, railway, franchises, rights or estates having been made as in said decree provided, all said property, railway, rights, franchises and estates upon which said improvement and equipment mortgage was a lien or charge, but none other, were, under and in accordance with the provisions of said interlocutory decree, offered for sale upon the 11th day of October, 1894, and then and there sold by the sheriff of Hennepin county, Minnesota, to F. P. Olcott, as chairman of a committee organized to purchase said property, and thereupon a certificate of such sale was duly executed and delivered by said sheriff to said Olcott, as such chairman. Thereafter, and upon the 31st day of October, 1894, said sale was duly confirmed by
111 this said court, and a final decree duly entered in said foreclosure action, adjudging the title to the railway, property,

franchises, rights and estates so sold to be in the assignees (hereinafter mentioned) of said Olcott, purchaser at said foreclosure sale.

In said foreclosure action all amounts due upon any and all the bonds and coupons secured by said improvement and equipment mortgage, and all indebtedness secured thereby, were fully paid and satisfied.

Immediately after said foreclosure sale said F. P. Olcott, as chairman of said committee of purchasers, sold and assigned to divers persons said certificate of sale and all right, title and interest thereunder or by virtue of said sale arising, and his said assignees, pursuant to the statutes of the State of Minnesota, in such case provided, did on or about the 2nd day of November, 1894, organize and incorporate a railway company called the Minneapolis & St. Louis Railroad Company, which said The Minneapolis & St. Louis Railroad Company thereupon, as successor of said Minneapolis & St. Louis Railway Company, became invested with all the property, railway, franchises, rights, privileges, immunities and estates embraced in said improvement and equipment mortgage and sold as aforesaid; and, as such successor to said Minneapolis & St. Louis Railway Company, entered into and has ever since remained in possession of, operating and enjoying all said property, rights, franchises and estates, the receiver appointed in said action then and there (that is, on or about the said 2nd day of November, 1894,)
112 delivering all of the same unto said The Minneapolis & St. Louis Railroad Company upon said 2nd day of November, 1894.

At the same time that said receiver delivered said property and rights above mentioned and sold as aforesaid unto said The Minneapolis & St. Louis Railroad Company, said receiver delivered unto said railroad company, and said railroad company entered into possession of, and has ever since held, operated and enjoyed, that portion of the line of railway of said defendant, The Minneapolis & St. Louis Railway Company, extending from Winthrop to Morton, in the State of Minnesota. Said railroad company is now, and ever since said 2nd day of November, 1894, has been in possession of and enjoying that portion of said railway under either title or claim of title to the same by virtue of said foreclosure sale, made as above stated in said foreclosure action above mentioned. Said receiver of said Minneapolis & St. Louis Railway Company no longer has any portion of the railway, property, franchises, rights or estates of said defendant, The Minneapolis & St. Louis Railway Company, in his hands. Said receiver has, so far as the custody, care or control of any part of the estate of said Minneapolis & St. Louis Railway Company is concerned, entirely discharged his trust, and is no longer entitled to take or hold any part of said estate.

On the 27th day of December, A. D. 1887, Revilo F. Parshall, in an action then pending in the circuit court of the United States, for the district of Minnesota, and brought to recover damages for personal injuries suffered by said Parshall in consequence of the
113 negligence of said defendant railway company, said court then and there having jurisdiction of all the parties, and of

the subject-matter of said action, wherein said Revilo F. Parshall was plaintiff and said defendant herein, Minneapolis & St. Louis Railway Company, was defendant, recovered a judgment against said defendant, Minneapolis & St. Louis Railway Company, for the sum of eight thousand seven hundred and nineteen dollars and ten cents ($8,719.10), which said judgment was then and there duly entered in said action. Upon said 27th day of December, 1887, said judgment was duly docketed in the office of the clerk of said circuit court of the United States for the district of Minnesota. Said judgment is wholly unpaid. Said judgment, so entered in said action and described as aforesaid, has not been in any way reversed, modified or superseded, and that there is no appeal or writ of error or other proceeding pending upon which said judgment can be reviewed, but said judgment is still in full force and effect.

After the rendition, entry and docketing of said judgment against said defendant, Minneapolis & St. Louis Railway Company, said defendant secured a stay of proceedings and of execution in said action wherein said Parshall was plaintiff and said railway company was defendant, for the purpose of providing time within which to have settled a bill of exceptions therein and to make a motion therein for a new trial of said action, and thus delayed said action until after the commencement of the foreclosure action, begun as aforesaid, and the appointment of a receiver therein, so that
114 when said stay of proceedings was vacated by the order of said United States circuit court, as it was thereafter vacated, it was impossible, and has ever since been impossible, to enforce said judgment or execution upon it or to realize thereupon, against or out of the estate of said railway company, for the reason that all the property of said defendant corporation upon which execution could have been levied was at the time of the vacation of said stay, and ever since has been, in the custody of said receiver, or in the hands of the Minneapolis & St. Louis Railroad Company.

After the entry of said judgment in favor of said Parshall, and before the commencement of this action, a writ of execution, in due form of law, out of and under the seal of said United States circuit court for the district of Minnesota, subscribed by the clerk of said court, and attested in the name of the Chief Justice of the Supreme Court of the United States, duly endorsed, directed and delivered to the United States marshal for said district of Minnesota, was duly issued against the property of said defendant, Minneapolis & St. Louis Railway Company, and thereafter, and before the commencement of this action, and on or about the 5th day of October, A. D. 1892, was returned into said court wholly unsatisfied, and said execution is the only execution ever issued upon said judgment. Said judgment does yet remain and is wholly unsatisfied and unpaid; that there is now due and owing upon said judgment said sum of eight thousand, seven hundred and nineteen dollars and ten cents ($8,719.10), with interest from the 27th day of December, 1887.

115 On or about the first day of October, 1892, said Revilo F. Parshall duly sold said judgment, together with any and all

sum or sums of money or other benefit or advantage that might be had or obtained by reason of the same, unto said plaintiff, Henry A. Gardner, and then and there duly executed unto said plaintiff an assignment of said judgment duly signed, sealed, and acknowledged in accordance with law, which said assignment of judgment was heretofore, and on the 18th day of October, A. D. 1895, duly filed in the office of the clerk of said United States circuit court for the district of Minnesota. Plaintiff is, and ever since said first day of October, A. D. 1892, has been the owner of and entitled to said judgment and all benefit or advantage to be had or obtained by reason thereof, and to enforce the same by execution or otherwise, and to prosecute any and all legal proceedings upon said judgment, and to give good and sufficient releases and discharges as fully as might have been done by said Revilo F. Parshall while said Parshall owned and held said judgment.

Said Minneapolis & St. Louis Railway Company is wholly insolvent, and, unless it be said portion of said railway extending from Winthrop to Morton as aforesaid, has not, and since said foreclosure sale has not had, any money or property whatsoever.

Said portion of said railway extending from Winthrop to Morton aforesaid consists of road-bed, rails, yards, station grounds, station-houses, bridges, culverts, and such other lands and structures
116 only as constitutes a part of the corpus of the railway of said Minneapolis & St. Louis Railway Company, and the same and all thereof are necessary in the operation of said railway.

Said Pacific Extension mortgage and said consolidated mortgage are still liens upon said portion of said railway, and said mortgages still secure respectively all the bonds secured by them upon said 28th day of June, 1888, and in consequence any sale of said portion of said railway upon execution, if the same could be had, would be ineffectual, inasmuch as only a nominal sum could be realized upon such sale.

At the time of and after the entry of the plaintiff's said judgment as aforesaid, and until at least November 2d, 1894, each of a large number of persons, copartnerships and corporations held shares of the capital stock of said defendant, The Minneapolis & St. Louis Railway Company, and each of a large number of persons, copartnerships and corporations now hold shares of such capital stock, unless having ceased so to do by reasons of facts hereinafter stated. The names of many of such shareholders are to plaintiff unknown, and plaintiff has no knowledge or information as to the names of or number of shares held by any one of the persons, copartnerships or corporations that have been or are such shareholders respectively, save as hereinafter stated.

Among those who have been shareholders in defendant are the defendants above named, to wit: William L. Bull, August Belmont, Edwin Hawley, Frederick P. Olcott, Richard B. Hartshorne, William A. Read, J. Kennedy Tod and William Strauss, and
117 they are now, and each of them is now, a shareholder in said defendant, The Minneapolis & St. Louis Railway Company,

unless they have ceased so to be shareholders by reason of facts hereinafter stated.

Each of said shareholders above named, except Edwin Hawley acquired all the shares of stock in said Minneapolis & St. Louis Railway Company held by him, as hereinafter stated, subsequently to April 26th, 1891. Said Hawley acquired 600 shares of his said stock November 10th, 1884, 100 shares February 4th, 1885, 300 shares June 24th, 1889, 1,100 shares July 20th, 1892.

Said individual defendants above named, between about April 26th, 1891, and November 2nd, 1894, held at least the number of shares in said defendant, The Minneapolis & St. Louis Railway Company, next hereinafter set opposite their names respectively, which said shares are of the par value of one hundred dollars ($100) each:

William L. Bull	200	shares.
August Belmont	100	"
Edwin Hawley	2,100	"
Richard B. Hartshorne	100	"
F. P. Olcott	10,623	"
W. A. Read	4,720	"
William Strauss	2,200	"
J. Kennedy Tod	2,900	"

and they still hold the same unless they have ceased so to do by reason of the facts next hereinafter stated.

On or about the 2d day of November, 1894, almost all the shareholders of said Minneapolis & St. Louis Railway Company, including all said defendants, offered to surrender all their said
118 shares of stock to said railway company; thereupon said railway company accepted such offer to surrender and in form retired all such shares and cancelled the certificates representing the same. (Such surrender, cancellation and retirement of the stock of said defendant railway company was made with knowledge on the part of and notice to all said shareholders in said company so surrendering said stock and of and to said defendant railway company that said railway company was then and there wholly insolvent and was liable upon a large amount of indebtedness, including plaintiff's said judgment.) Said surrender, retirement and cancellation of said stock were made gratuitously and without consideration. Plaintiff never had any knowledge or notice thereof until the service of the answer of said defendant shareholders herein to plaintiff's amended complaint.

All said defendant shareholders who join in said answer to plaintiff's amended complaint are residents of the State of New York, and have been such since a time prior to December 27th, 1887, and during all said period have been out of the State of Minnesota.

Said Henry A. Gardner and Revilo F. Parshall, his assignor, have never at any time been citizens or residents of the State of Minnesota.

Said Henry A. Gardner is and has been at all times since the judgment referred to in said complaint was assigned to him by said Revilo F. Parshall, a citizen and resident of the State of Illinois.

That said Revilo F. Parshall was at all times prior to his
119 death a citizen and resident of the States of Wisconsin and Illinois, and was at the time of his death, a citizen and resident of the State of Illinois.

The statute of limitations of the State of New York are as recited in the amendment to the answer of the defendants William Strauss, William L. Bull, Richard B. Hartshorne, and Edwin Hawley.

Nothing in this stipulation shall preclude either of the parties to said above entitled action from introducing evidence upon any of the issues involved in said action not inconsistent with this stipulation of facts.

It is further stipulated that all special legislative acts and parts of acts dealing with said defendant, The Minneapolis & St. Louis Railway Company, or said Minnesota Western Railroad Company, under whatsoever name, shall be considered in evidence herein, without anything farther; as well as all general laws and constitutional provisions of this State that may be read or referred to upon the hearing hereupon.

Dated Nov. 10th, 1896.

(Signed) F. W. M. CUTCHEON,
Attorney for Plaintiff.
ALBERT E. CLARKE AND
W. F. BOOTH,
Attorneys for Defendants Bull, Hartshorne, Hawley, and Strauss.

120 "EXHIBIT B."

STATE OF MINNESOTA, }
County of Hennepin. }

District Court, Fourth Judicial District.

HENRY SEIBERT, Trustee, Successor to the Central Trust Company of New York, Plaintiff,
vs.
THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY ET AL., Defendants.

This cause coming on to be heard on the application of the plaintiff for the appointment of a receiver to take possession of, manage and control the property of the defendant, The Minneapolis & St. Louis Railway Company, J. W. Shaw, Esq., and Eugene M. Wilson, Esq., appearing for the plaintiff, and J. D. Springer, Esq., appearing for the defendant, The Minneapolis & St. Louis Railway Company, and the court being satisfied that said railway company is insolvent; that the improvement and equipment mortgage in which the plaintiff is trustee is not adequate security for the principal of the bonds issued under it; that said company had already made default in the payment of interest which has accrued and become payable on

the said bonds, as well as upon other bonds secured by other mortgages; that it appears that money, which it has received and
121 continues to receive, which should be applied to the payment of interest on the improvement and equipment bonds, have been, and if said company remains in possession of its property will continue to be applied, on other obligations; that there is reason to apprehend that because of the company's insolvent condition it will be obstructed in the performance of its duties as a common carrier to the great injury and inconvenience of the public, the company and its creditors; therefore grant said application; and does hereby appoint and constitute William H. Truesdale as receiver of this court, charged with the performance of the duties incident to the office of receiver, and especially those hereinafter stated. He is hereby directed:

1. To assume possession of all property, moneys and assets of the said railway company; to manage and operate its railway and appurtenant property, and to receive and receipt for all moneys which are now or shall hereafter become due and payable to it from any and all persons and corporations whomsoever.

2. To cause to be prepared and submitted to the court a statement of the liabilities of the corporation, including its debts secured by mortgage or other lien, with its other debts.

3. To carefully keep and preserve all property and moneys which shall come into his hands as receiver; to operate and manage said railway and its appurtenant property with a view to securing the best results practicable under the circumstances.

122 4. To keep full and true accounts showing all receipts and disbursements by him made, which account shall commence as of the first day of July next.

5. To observe and perform, until otherwise ordered by the court, all obligations assumed by said railway company in traffic and running arrangements and leases as the same may have been hitherto observed and performed by said railway company; and especially to observe and perform those set out in divisions VIII, XVIII, XIX, XX, XXIII, XXIV, XXV and XXVI of this complaint.

It is further ordered that the receiver is authorized to disburse out of moneys which shall come into his hands as receiver, so much as shall be necessary in payment of the legitimate expenses incurred in operating and maintaining said railway and its appurtenant property, but that no other disbursements shall be made until ordered by the court; that for convenience of adjustment the existing accounts of the railway company shall be closed as of the 30th day of the present month, but all balances then due thereon to the railway company shall be paid to the receiver and debited to him in his accounts as of the 1st day of July, 1888.

The receiver hereby appointed will execute as principal, with two sureties, to be approved by the court, a bond in the sum of one hundred thousand dollars ($100,000), conditioned that he will faithfully perform his duties as such receiver.

A. H. YOUNG,
Judge of said Court.

(June 28th, 1888.)

123 (Title of Action.)

Additional Stipulation of Facts.

It is hereby stipulated between the parties hereto that the following facts, not included in the stipulation of facts heretofore made, shall be and are hereby conceded to exist, and are admitted as part of the evidence in this case.

1. The Minneapolis & St. Louis Railway Company referred to in the consolidation agreement referred to in folios four (4), five (5) and six (6) of the amended complaint, a copy of which said consolidation agreement is attached to the stipulation of facts previously made, was, as it existed prior to said consolidation, that certain railroad corporation of the State of Minnesota, incorporated under the name of the Minnesota Western Railroad Company, by a special act of the legislature of the Territory of Minnesota, approved March 3d, 1853, as set forth in folio 2, paragraph 1, of said amended complaint. The Minneapolis & Duluth Railroad Company, referred to in said consolidation agreement, was an organization created under an agreement, a copy of which is attached to this stipulation. The line of road constructed by said Minneapolis & Duluth Railroad Company was one of the lines of road which the Minnesota Western Railroad Company was authorized to build, and was built, under an agreement, a copy of which is attached to this stipulation.

2. The other two constituent companies, parties to said consolidation agreement, the Fort Dodge & Fort Ridgely Railroad
124 Company and the Minnesota & Iowa Southern Railroad Company, were, at and previous to the execution of said consolidation agreement, railroad corporations of the State of Iowa. Copies of the articles of incorporation of said two last-named railroad companies are hereto attached and hereby made a part of this stipulation.

3. At the time of the incorporation of said two last-named railroad companies in the State of Iowa, the law of said State of Iowa authorized the incorporators of railroad companies to exempt themselves from personal liability for the corporate debts by embodying in the articles of incorporation an article or provision declaring said exemption.

4. The actual construction of a line of railway by the Minneapolis & St. Louis Railway Company was commenced during the summer and fall of 1870, since which time said company, or the said consolidated company, have at all times operated and maintai-ed a line of railway in the State of Minnesota.

F. W. M. CUTCHEON,
Attorney for Plaintiff.
ALBERT E. CLARKE AND
W. F. BOOTH,
Attorneys for Defendants.

Dated November 18th, 1896.

125 EXHIBITS OFFERED IN EVIDENCE.

EXHIBIT "1."

Agreement.

The Minneapolis & St. Louis Railway Company with Henry T. Welles and W. D. Washburn.

Memorandum and agreement made and entered into this 1st day of April, one thousand eight hundred and seventy-one, by and between the Min-apolis & St. Louis Railway Company, party of the first part, and Henry T. Welles and William D. Washburn, of Hennepin county, State of Minnesota, parties of the second part.

Witnesseth, that whereas, the Minneapolis & — Louis Railway Company is desirous of having that part of its road (lying between the St. Paul & Pacific railroad and the Lake Superior & Mississippi railroad) built as early as is practicable, and is unable at the present time to advance the money necessary to construct and equip the same, therefore, in consideration of the premises and of the agreements and promises hereinafter contained on the part of the parties of the second part, the said party of the first part does hereby agree to issue to the parties of the second part above named (Henry T. Welles and William D. Washburn) a certificate of special stock of the said Minneapolis & St. Louis Railway Company to the amount of two thousand shares of one hundred dollars par value
126 each share, which said special stock is and shall be only applicable to that portion of the Minneapolis & St. Louis Railway Company authorized to be constructed by the charter of said company, beginning at or near the junction depot of the First division of the St. Paul & Pacific Railroad Company in St. Anthony, and running thence in a northeasterly direction to a point of junction with the Lake Superior & Mississippi railroad at or near White Bear lake, in Ramsey county, State of Minnesota, being estimated at about thirteen miles, more or less. Said stock shall be transferable by the parties of the second part by sale or assignment, on such terms and to such persons as they may see fit, and shall entitle the said Henry T. Welles and William D. Washburn, their executors, administrators and assigns, to the full, complete and exclusive ownership and control of all and every the rights, franchises, privileges, hereditaments and powers of the said Minneapolis & St. Louis Railway Company, applicable or in any way pertaining to, or which may be hereafter applicable or pertain to that portion of the railroad authorized to be constructed by the said The Minneapolis & St. Louis Railway Company as above mentioned. The party of the first part further agrees that the parties of the second part may organize a corporation by the name of the Minneapolis & Duluth Railroad Company to construct such part of the road above mentioned and to manage, operate and enjoy the same, and to have and exercise all the rights, powers, franchises and privileges in re-

gard to said road and its appurtenances as now belong or
127 appertain to the Minneapolis & St. Louis Railway Company, and to mortgage and to lease said road and its franchises and appurtenances upon such terms and for such time as shall to such company seem fit, and generally to do all acts and things requisite and necessary in and about the premises, and the construction and management of said road.

The party of the first part further promises and agrees to and with the parties of the second part, their executors, administrators and assigns, and with the corporation to be organized by them under this agreement, that it will give them and such corporation an equal share, right and privilege in all depot grounds and buildings which it may purchase or acquire in Minneapolis, and in any bridge it may build across the Mississippi river to connect its road with the part of its said road above mentioned east of the Mississippi river, and the benefit and advantage of any contract it may make with any other road, and especially with the First division of the St. Paul & Pacific railroad for running over its road from St. Anthony into Minneapolis, and the use of any road, side track, switches, or roads connecting with the mills in Minneapolis which the said party of the first part may hereafter construct or cause to be built, or own in the said city of Minneapolis; the parties of the second part or their assigns, or the said corporation to be organized by them, first to pay a just proportion of the expense of such structures and right of way and depots and depot grounds.

128 The parties of the second part, for themselves and their assigns, promise and agree in consideration of the issuance to them of said special stock and the rights and privileges above granted, to build or cause to be built a railroad, beginning at or near the junction depot of the First division of the St. Paul & Pacific railroad in St. Anthony to a point of junction with the Lake Superior & Mississippi railroad at or near White Bear lake, in the county of Ramsey, and to complete and furnish the same suitable for use and the running of cars thereon by the first day of September, one thousand eight hundred and seventy-one.

In witness whereof the Minneapolis & St. Louis Railway Company has caused its corporate seal to be hereunto affixed, duly attested by the president and secretary of said company, and the parties of the second part have hereunto set their hands and seals the day and year first above written.

HENRY T. WELLES,
President Minneapolis & St. Louis Railway.

Attest: ISAAC ATWATER, *Secretary.*

HENRY T. WELLES. [SEAL.]
WILLIAM D. WASHBURN. [SEAL.]

[One 25c. rev. stamp cancelled.]

Signed, sealed, and delivered in presence of—
R. P. RUSSELL.
E. S. ADAMS.

[CORPORATE SEAL.]

129 At a meeting of the stockholders of the Minneapolis & St Louis Railway Company, held at the office of the company in Minneapolis April 1st, 1871, pursuant to adjournment.

On motion of Paris Gibson, seconded by W. D. Washburn, the following resolution was adopted:

Whereas, a contract has been entered into by and between the Minneapolis & St. Louis Railway Company, parties of the first part, and H. T. Welles and W. D. Washburn, parties of the second part, and bearing date April 1st, 1871, whereby two thousand shares of one hundred dollars par value each share, is to be issued to said parties of the second part for the purpose of building and equipping that part of its road lying between the St. Paul & Pacific railroad and the Lake Superior & Mississippi railroad, therefore resolved, that the said contract be and the same hereby is in all things ratified, confirmed and approved.

I. ATWATER, *Secretary.*

(Duly acknowledged.)

EXHIBIT "2."

Articles of Agreement and Association.

Articles of agreement and association made and concluded the twenty-fourth day of April, anno Domini one thousand eight hundred and seventy-one (1871), between Henry T. Welles and W. D. Washburn, of Hennepin county, State of Minnesota, parties of the first part, and Wm. G. Moorhead, Samuel M. Felton,
130 and Frank H. Clark, of the city of Philadelphia, parties of the other part.

Whereas, by an act of the Legislative Assembly of the Territory of Minnesota, entitled "An act to incorporate the Minnesota Western Railroad Company," approved March 3d, 1853, certain persons therein named, with such other persons as might thereafter become associated with them, their successors and assigns, were created a body corporate by the name of the Minnesota Western Railroad Company, with authority to construct and operate a railroad as therein mentioned.

And, whereas, by a supplement to the said act approved March 5th, 1869, the said company was authorized to construct and run a railroad from Stillwater on Lake St. Croix; thence running to the city of St. Anthony, on the Mississippi river; thence across the said river via *of* the city of Minneapolis to a convenient point of junction with certain other railroads therein mentioned.

And, whereas, by a certain other act of the legislature of the State of Minnesota, entitled "An act to amend an act entitled An act to incorporate the Minnesota Western Railroad Company, approved March third, one thousand eight hundred and fifty-three (1853), and the acts amendatory thereof," approved February fourth, one thousand eight hundred and seventy (1870), it was provided among other things as follows, to wit: And said company may by a resolution of its board of directors change the name of said company and

adopt any suitable name by which said company shall in future be known, and may designate the name by which any branch line
131 shall be known, to take effect after public notice of such change shall be given for one month in any daily paper published at the city of Minneapolis, but such change of name shall not effect any rights or liabilities of said company under any former name. And said company shall have power to create and issue in such manner and on such terms as it may deem expedient, one or more classes of preferred stock and special stock, and to make such agreements as it may deem proper with the respective holders thereof as to the dividends thereon, and the securities for such dividends, and to make such agreements as it may deem proper with the holders of any such special stock for the appropriation of the net earnings of any portion of the railroad which it may construct or otherwise acquire to the payment of dividends on such special stock as may be issued in respect thereto, which appropriation, as made by such agreement, shall be effectual to secure to the said and future holders of such stock, the application of such net earnings as in the said agreement provided, against any future act of the company or any of its general liabilities. And the said company may make such agreements as it may deem proper with the holders of any such special stock as to the construction and administration of the portion of said railroad to which said stock may pertain, and for the separate organization of the holders of such special stock for the purpose of that construction and administration, and enabling them or directors chosen by them separately, or in conjunction with the other directors, to exercise in respect to the portion of
132 the road to which such special stock may pertain, all the powers of the company subject to the provisions of such agreement when made and entered into."

And whereas, by a further supplement to the charter of the said company, passed by the legislature of the State of Minnesota, approved the 25th day of February, one thousand eight hundred and seventy-one (1871), it was provided among other things as follows, to wit:

The directors of the said company, by whatever name the same may be called, shall be and they are hereby authorized and empowered to borrow money for the corporate purposes of said company by the issue and sale of its bonds, for the purpose of the construction and equipment of any portion of its main line or branches thereof, and shall have power to make and execute a mortgage or mortgages upon such portions of its road constructed and to be constructed, together with its franchises and all or any part of the property of said company now in possession or hereafter acquired, and may permit or grant the right to any person or persons either as individuals or in a corporate capacity, to construct, build, equip, hold, operate, manage and control any such portion of said road or branch under such name, and with such regulations as such persons or persons or corporation may adopt, with the same right and liabilities as the said company may have or be subject to by virtue of its charter and the amendments thereto. Whenever any number of

persons shall become associated as a company or corporation pursuant to the charter of said Minnesota Western Railroad
133 Company, and the acts amendatory thereof, or otherwise, for the purposes aforesaid, they shall have power at any time to contract with any other railroad company or companies of this State in relation to any matters or things touching the construction of its railroad and appendages and the running of cars and locomotives thereon, and the leasing for any term of years of the whole or any part of its railroad and franchises to any other railroad company of this State, and contracts so made shall be valid and binding on the parties thereto.

And whereas, at a meeting of the board of directors of the said Minnesota Western Railroad Company held at Minneapolis on the twenty-sixth day of May, one thousand eight hundred and seventy, the name of the said railroad company was changed to the Minneapolis & St. Louis Railway Company, by which last-mentioned name the said company has since been known and designated.

And whereas, by authority of the aforesaid acts of the legislature of the State of Minnesota, a certain agreement was made and concluded between the said Minneapolis & St. Louis Railway Company and Henry T. Welles and W. D. Washburn, parties hereto of the first part, dated the first day of April, A. D. one thousand eight hundred and seventy one (1871), as follows, to wit: Memorandum of agreement made and entered into this first day of April, A. D. one thousand eight hundred and seventy-one (1871), by and between the Minneapolis & St. Louis Railway Company, party of the first part, and Henry T. Welles and William D. Washburn,
134 of Hennepin county, State of Minnesota, parties of the second part, witnesseth.

That whereas, the Minneapolis & St. Louis Railway Company is desirous of having that part of its road lying between the St. Paul & Pacific railroad and the Lake Superior & Mississippi railroad built as early as is practicable, and is unable at the present time to advance the money necessary to construct and equip the same, therefore in consideration of the premises and of the agreements and promises hereinafter contained on the part of the parties of the second part, the said party of the first part does hereby agree to issue to the parties of the second part above named, Henry T. Welles and W. D. Washburn, a certificate of special stock of the said Minneapolis & St. Louis Railway Company to the amount of two thousand shares of one hundred dollars par value each share, which said special stock is and shall be only applicable to that portion of the Minneapolis & St. Louis Railway Company authorized to be constructed by the charter of said company beginning at or near the junction depot of the First division of the St. Paul & Pacific Railroad Company, in St. Anthony, and running thence in a northeasterly direction to a point of junction with the Lake Superior & Mississippi railroad at or near White Bear lake, in Ramsey county, State of Minnesota, being estimated at or about thirteen miles, more or less. Said stock shall be transferrable by the parties of the second part, by sale or assignment, on such terms

and to such persons as they may see fit, and shall entitle the said Henry T. Welles and William D. Washburn, their executors, administrators and assigns to full, complete and ex-
135 clusive ownership and control of all and every the rights, franchises, privileges, hereditaments and powers of the said Minneapolis & St. Louis Railway Company, applicable or in any way pertaining to or which may be hereafter applicable or pertain to that portion of the railroad authorized to be constructed by said Minneapolis & St. Louis Railway Company, as above mentioned. The party of the first part further agrees that the said parties of the second part may organize a corporation by the name of the Minneapolis & Duluth Railroad Company to construct such part of the road above mentioned, and to manage, operate and enjoy the same, and to have and exercise all the rights, powers, franchises and privileges in regard to the said road and its appurtenances, as now belong or appertain to the Minneapolis & St. Louis Railway Company, and to mortgage and lease said road and its franchises and appurtenances on such terms and for such time as shall to such company seem fit, and generally do all acts and things requisite and necessary in and about the premises, and the construction and management of said road. The party of the first part further promises and agrees to and with the parties of the second part, their executors, administrators and assigns, and with the corporation to be organized by them under this agreement, that it will give them and such corporation an equal share, right and privilege in all depot grounds and buildings which it may purchase or acquire in Minneapolis, and in any bridge it may build across the Mississippi river to connect its road with the part of its said road above mentioned, east of the Mississippi river,
136 and the benefit and advantage of any contract it may make with any other road, and especially with the First division of the St. Paul & Pacific railroad for running over its road from St. Anthony into Minneapolis, and the use of any road, side tracks, switches or roads connecting with the mill, in Minneapolis, which the said party of the first part may hereafter construct or cause to be built, or own in the said city of Minneapolis, the parties of the second part and their assigns or the said corporation to be organized by them first to pay a just proportion of the expenses of such structures, and right of way and depots and depot grounds. The parties of the second part for themselves and their assigns promise and agree, in consideration of the issuance to them of said special stock and the rights and privileges above granted, to build or to cause to be built a railroad beginning at or near the junction depot of the First division of the St. Paul & Pacific railroad in St. Anthony to a point of junction with the Lake Superior & Mississippi railroad at or near White Bear lake, in the county of Ramsey, and to complete and furnish the same suitable for use and the running of cars thereon by the 1st of September, 1871. Recorded in reg. of deeds office, Hennepin county, Minnesota, in Book 3, Miscellaneous, 399, &c., and in Ramsey county, Minnesota, in Book "B," Miscellaneous, p. 501, &c.

And, whereas, at a meeting of the stockholders of the Minneapolis & St. Louis Railway Company held at Minneapolis on the

first day of April, A. D. eighteen hundred and seventy-one,
137 the aforesaid agreement, and the issuing of the said two thousand shares of special stock as therein mentioned were duly approved, ratified and confirmed.

And, whereas, the said two thousand shares of special stock, having been duly issued to the said Henry T. Welles and W. D. Washburn, in pursuance of the said agreement, the said parties, their executors, administrators and assigns, under and by virtue of the aforesaid acts of the legislature of Minnesota, and of the said agreement, are entitled to the full, complete and exclusive ownership and control of all and every the rights, franchises, privileges, hereditaments and powers of the said railway company, applicable or in anywise appertaining to, or which may be hereafter applicable or pertain to the said portion of the said railroad above mentioned, with power among other things to organize a corporation with all the corporate powers, privileges and franchises of the said Minneapolis & St. Louis Railway Company, for the construction, use, management and enjoyment of the same.

And, whereas, the said Henry T. Welles and W. D. Washburn have assigned certain shares of the said special stock to the other parties hereto with a view to the organization of a corporation under and by virtue of the said acts of the legislature of the said State, and in pursuance of the aforesaid agreement, and for the purposes therein expressed.

Now, therefore, these presents witness, that the said Henry T. Welles, W. D. Washburn, William G. Moorhead, Samuel M. Felton
and Frank H. Clark (being the holders of the said two
138 thousand shares of special stock), in consideration of the premises and for the purpose of carrying into effect the aforesaid agreement in relation thereto, according to the true intent and meaning of the said agreement, have associated and do, hereby associate in a corporate capacity, under the corporate name or title of "The Minneapolis & Duluth Railroad Company," and by the said title do, as a corporation, and not individually, assume all the corporate rights and liabilities of the said Minneapolis & St. Louis Railway Company, in respect to all that portion of the railroad authorized to be constructed by the charter of the said company, described as follows, to wit: Beginning at or near the junction depot of the First division of the St. Paul & Pacific Railroad Company in St. Anthony and running thence in a northeasterly direction to a point of junction with the Lake Superior & Mississippi railroad at or near White Bear lake, in Ramsey county, State of Minnesota, a distance of thirteen miles, more or less. And the said parties hereto agree as follows, to wit:

First. That the affairs of the said company shall be managed by a board of directors consisting of five stockholders in the said company, to be elected by the stockholders annually, as prescribed by the charter of the Minneapolis & St. *St.* Louis Railroad Company. And until the annual meeting next succeeding the date of these articles, the following-named persons shall be the directors to wit:

Frank H. Clark, Henry T. Welles, W. D. Washburn, William G. Moorhead and Samuel M. Felton.

139 The directors shall elect one of their number as president of the company, and shall appoint a secretary, treasurer and such engineers and other officers as they may find necessary, and shall fix their compensation.

Second. The said two thousand shares of special stock held by the several parties hereto shall be the capital stock of this company, and shall be transferrable only on the books of this company, and when transfers are made and new certificates issued such new certificates shall be issued in the name of this company.

Third. The directors shall have power to borrow for the corporate purposes of the company, any sum of money not exceeding four hundred thousand dollars, to be used in the construction and equipment of the said railroad, and any branches or extensions which the company may be authorized to make, and for the said purpose they may issue bonds under the corporate seal bearing interest at the rate of seven per cent. per annum, payable semi-annually, and secure the payment thereof by mortgage of the said railroad to be constructed together with its franchises, and any part of the property of the company now in possession or hereafter acquired, and they shall have power at any time to contract with any other railroad company or companies of this State in relation to any matters or things touching the construction of the said railroad and appendages and the running of cars and locomotives thereon, and the leasing for any term of years of the whole or any part of the railroad and franchises of this company, to any other railroad company of the State of Minnesota, on such terms as they may agree upon.

140 In witness whereof, the said parties have hereunto set their hands and seals respectively, the day and year first above written.

WM. G. MOORHEAD.	[SEAL.]
S. M. FELTON.	[SEAL.]
FRANK H. CLARK.	[SEAL.]
WILLIAM D. WASHBURN.	[SEAL.]
HENRY T. WELLES.	[SEAL.]

Signed, sealed and delivered in the presence of us by Wm. G. Moorhead, Sam'l M. Felton, Frank H. Clark and Wm. D. Washburn:

W. S. ALEXANDER.
CHAS. S. HINCHMAN.

And by Henry T. Welles in the presence of—
IRA JOHNSON.
SAMUEL BUNDOCK.

[Internal-revenue stamp, 25 cents, cancelled.]
[Internal-revenue stamp, 10 cents, cancelled.]

EXHIBIT "3."

Articles of Incorporation of the Minnesota & Iowa Southern Railway.

Filed in the office of the secretary of state, July 13, 1885, and in office of recorder of Winnebago county, May 5, 1878.

Art. 1. Know all men by these presents: That David Secor,
141 Mikkel Peterson, J. Thompson, W. Larson, C. D. Smith, S. D. Wadsworth, J. M. Hull, J. W. Mahoney and S. G. Honsey hereby form a corporation under the name and style of the Minnesota & Iowa Southern Railway Company, for the purpose of constructing, operating and maintaining a railroad from a point on the Minnesota State line at or near range twenty-three west of the 5th principal meridian, and running across the county of Winnebago, in the State of Iowa, to the intersection of some line or lines of railroad running in a southerly direction.

Art. 2. The corporation shall commence on the 1st day of May, A. D. 1878, and continue for fifty years, with the right of renewal and perpetual succession.

Art. 3. The principal place of business of said company shall be at Forest City, Iowa, and stockholders' meetings and meetings of the board of directors shall be held there.

Art. 4. The board of directors of said corporation shall have power to transfer or lease the said road to be constructed to any other railroad company, or to consolidate the stock with such other company, if in the opinion of the directors a better and longer line of road can be secured by such transfer, lease or consolidation.

Art. 5. The capital stock of said company may be three millions of dollars ($3,000,000), divided into shares of one hundred dollars each, and at all stockholders' meetings each share of stock shall be entitled to one vote. The stock may be subscribed for at such times and in such amounts as the board of directors may from time to time determine. The times and conditions on which it is
142 to be paid in shall also be determined by the board of directors.

Art. 6. The greatest amount of indebtedness which the company may have at any one time shall not exceed two-thirds of the capital stock.

Art. 7. The affairs of the company shall be managed by a board of nine directors, who shall continue to be directors until the first Monday in June, one thousand eight hundred and seventy-nine, when the stockholders shall hold their first annual meeting for the election of directors, and annually thereafter the election of directors shall be held on the first Monday in June. It is provided, how-

ever, that David Secor, Mikkel Peterson, J. Thompson, W. Larson C. D. Smith, S. D. Wadsworth, J. M. Hull, J. W. Mahoney and S. G Honsey shall constitute the first board of directors for the purpose of organizing the company, procuring right of way, locating line of road and procuring such rights and property as may be deemed necessary for the company.

Art. 9. The private property of the officers or members of the company shall not be liable for the company's debts.

Art. 10. The board of directors shall have power to fill any vacancy that may at any time exist in their body until their successors are duly elected.

Art. 11. The officers of the company shall consist of a president vice-president, treasurer and secretary, and of such other officers as the board of directors shall deem expedient, all of whom shall be elected by the directors.

143 Art. 12. The following persons are the officers of this company:

David Secor, president.
J. Thompson, vice-president.
Wm. Larson, treasurer.
J. W. Mahoney, secretary.

Art. 13. The board of directors shall have full power and authority to authorize the president and secretary to execute a mortgage or deed of trust on the whole or any part of the property of the company to secure the payment of the bonds of the company, in such amounts and upon such terms and conditions as the directors may think best. The said directors may prescribe the manner in which the company's railway may be used, may regulate the operating and running of trains, may regulate fares and rates of toll or tariffs for the transportation of property and passengers over the company's railway.

Art. 14. All certificates of stock, contracts, agreements and bonds shall be signed by the president and secretary.

DAVID SECOR.
MIKKEL PETERSON.
J. THOMPSON.
WM. LARSON.
C. D. SMITH.
S. D. WADSWORTH.
J. M. HULL.
J. W. MAHONEY.
S. G. HONSEY.

(Duly acknowledged.)

144 EXHIBIT "4."

Articles of Incorporation of the Fort Dodge & Fort Ridgely Railroad and Telegraph Company.

Art. I. Adolphus Jenkins, Esterville, Emmet Co.; Mathew Richmond, Armstrong Grove, Emmet Co.; W. H. Shea, Emmetsburg, Iowa; J. Van Meter, Dakota, Iowa; Charles B. Richards, Fort Dodge, Iowa; George R. Pearsons, Fort Dodge, Iowa; E. S. Ormsby, Emmetsburg, Iowa; M. E. L. Shanks, Fairmont, Minn.; Daniel Alton, Tenhassen, Minn.; Parsley Finch, Humboldt, Iowa; Walter H. Brown, Emmet Co., Iowa, and associates, form themselves into a corporation under the name and style of the Fort Dodge & Fort Ridgely Railroad and Telegraph Company, with full power under said corporate name to sue and to be sued, to acquire and dispose of property, real and personal, and to do all other acts which a railroad and telegraph company in the State of Iowa may lawfully do.

Art. II. The object of said corporation is to construct, operate and maintain a railroad and telegraph line from a point in Webster or Hamilton county, Iowa, to the north line of the State of Iowa, in Kossuth or Emmet county, Iowa, to connect with a railroad and telegraph running in the direction of Fort Ridgely, in Minnesota.

Art. III. This corporation shall commence on the third day of July, eighteen hundred and seventy-six (1876), and continue fifty (50) years, with right of renewal.

145 Art. IV. The capital stock shall be two million ($2,000,000) dollars, in shares of one hundred dollars ($100) each, to be called in at the rate of not exceeding ten (10) per cent. monthly, as the board of directors may direct, and the indebtedness shall not at any time exceed one million dollars ($1,000,000) in the aggregate.

Art. V. The affairs of the company shall be managed by eleven (11) directors, who shall be stockholders, and be elected annually on the first Tuesday in January by the stockholders in person or by proxy. The first election to be held on the first Tuesday in January, eighteen hundred and seventy-nine (1879), to which time the corporators named shall constitute the board of directors, and hold their offices until said time, and any vacancy can be filled by the directors, or the directors remaining in said board, and a majority in person shall constitute a quorum for the transaction of any business for the company.

Art. VI. The board of directors shall elect from their number a president, who shall have such powers as may be given by law, and fixed in the by-laws, and they shall appoint a secretary, treasurer and such other officers and agents as they may deem necessary, all under the control of the said board, and they may require each officer or agent to give security for the faithful performance of his duty.

Art. VII. The private property of the stockholders shall be exempt from the payment of corporate debts.

Art. VIII. The principal place of business shall be in Fort Dodge, Webster county, Iowa.

Signed this fourteenth day of July, A. D. eighteen hundred and seventy-six (1876).

146

MATHEW RICHMOND,
Armstrong Grove, Emmet Co.
ADOLPHUS JENKINS,
Esterville, Emmet Co.
W. H. SHEA, *Palo Alto Co.*
I. VAN METER, *Humboldt Co.*
CHARLES B. RICHARDS,
Fort Dodge, Iowa.
GEORGE R. PEARSON,
Fort Dodge, Iowa.
E. S. ORMSBY, *Emmetsburg, Ia.*
M. E. L. SHANKS,
Fairmont, Minn.
DANIEL ALTON,
Tenhassen, Minn.
PARLEY FINCH, *Humboldt, Ia.*
WALTER H. BROWN,
Emmet Co., Iowa.

STATE OF IOWA, *Webster County,* } ss:

Filed for record July 15th, 1876, at 4 o'clock p. m., and duly recorded in Book N 1 of Miscellaneous Records, pages 58 and 59.

JARED FULLER, *Recorder.*

STATE OF IOWA:

Filed for record July 22d, 1876.

JOSIAH T. YOUNG,
Secretary of State.

Fort Dodge & Fort Ridgely Railroad and Telegraph Company.

Resolutions of the board of directors of the Fort Dodge & Fort Ridgely Railroad and Telegraph Company, ordering change in articles of incorporation by changing name of company, and calling a meeting of the stockholders to assent to such change, as provided by section 1273 of the Code of 1873.

At a meeting of the board of directors of the Fort Dodge & Fort Ridgely Railroad and Telegraph Company, held at the office
147 of the said company in the city of Fort Dodge, Iowa, on the 23d day of November, A. D. 1878, the following resolution was unanimously adopted, to wit:

Resolved, That the name of this company be changed by striking out of the articles of incorporation the words "and telegraph," so as the name of the company will read, Fort Dodge & Fort Ridgely Railroad Company, and that the articles of incorporation be so changed, and the secretary shall give notice of a meeting of the

stockholders, as provided by the by-laws, to be held on the 27th day of November, A. D. 1878, at 2 o'clock p. m. of said day, at the office of John F. Duncombe, in the city of Fort Dodge, Iowa, for the purpose of assenting to or rejecting said change, as provided by section 1273 of the Code of 1873.

I hereby certify that the above and foregoing is a true and correct copy of an order of the board of directors of the Fort Dodge & Fort Ridgely Railroad and Telegraph Company which passed unanimously November 23d, A. D. 1878, as witness my hand and the seal of the company this 27th day of November, A. D. 1878.

[CORPORATE SEAL.] GUS. T. PETERSON, *Secretary.*

Stockholders' meeting of the Fort Dodge & Fort Ridgely Railroad and Telegraph Company, held November 27th, A. D. 1878.

The stockholders of the Fort Dodge & Fort Ridgely Railroad and Telegraph Company met at the office of John F. Duncombe, in the city of Fort Dodge, Iowa, on the 27th day of November, A. D.
148 1878, pursuant to the call of the vice-president (in the absence of the president), of which all the stockholders were notified by personal service of notice in writing that a meeting would be held on said 27th day of November, A. D. 1878, at 2 o'clock p. m.

Meeting called to order by John F. Duncombe. On motion Geo. W. Bassett was elected chairman and Gus. T. Peterson was elected secretary. The following motion was then made, to wit: Moved that a vote be taken by stocks on the question of changing the name of this company by striking out the words, "and telegraph," so that the name will read Fort Dodge & Fort Ridgely Railroad Company.

And said motion having been duly seconded was put by the chairman, and the secretary called the following-named stockholders, who voted as follows on said motion, viz:

A. McBane,	3	shares,	yea.
Wm. M. Grant,	3	"	"
Geo. R. Pearsons,	7	"	"
Isaac Garmoe,	5	"	"
J. M. Mulroney,	2	"	"
Geo. W. Bassett,	5	"	"
E. E. Prusia,	5	"	"

Absent: L. Blanden, 1 share, and C. Rank, 1 share.

All the stockholders where present except the two shares above named, and more than two-thirds of the stockholders in number and amount having voted for said change the said motion was declared carried and the said change duly ordered and the sec-
149 retary authorized to make publication thereof and prepare the necessary papers, etc., to be filed for record in the office of recorder of deeds, of Webster county and in the office of the secretary of state of the State of Iowa.

I hereby certify that the above and foregoing is a true and correct copy of resolution of the stockholders of the Fort Dodge & Fort

Ridgely Railroad and Telegraph Company, passed unanimously November 27th, 1878, as witness my hand and seal of the company at my office, in the city of Fort Dodge, Iowa. This 27th day of November, A. D. 1878.

[CORPORATE SEAL.] GUS. T. PETERSON, *Secretary.*

In witness whereof, the vice-president, in the absence of the president, and the secretary of the said Fort Dodge & Fort Ridgely Railroad and Telegraph Company, have hereunto set their names and affixed the seal of the said company, at the city of Fort Dodge, Iowa, this 27th day of November, A. D. 1878, by order of the board of directors.

[CORPORATE SEAL.] GEO. W. BASSETT, *Vice-President.*
GUS. T. PETERSON, *Secretary.*

STATE OF IOWA, } ss:
Webster County, }

On this 27th day of November, A. D., 1878, before me, the undersigned, a notary public in and for said county and State, personally appeared Geo. W. Bassett, vice-president, and Gus. T. Peterson, secretary of the Fort Dodge & Fort Ridgely Railroad and
150 Telegraph Company, to me personally known to be the identical persons whose names are affixed to the above instrument as vice-president and secretary, and severally acknowledged the same, and that they executed the foregoing instrument on behalf of the said railroad company and by order of its board of directors and for the purposes set forth, and that the same is the voluntary act of the Fort Dodge & Fort Ridgely Railroad and Telegraph Company, by them as officers thereunto appointed, voluntarily done and executed the day and year last above written.

As witness my hand and notarial seal this day.

[SEAL.] LEON VINCENT,
Notary Public, Webster Co., Iowa.

Affidavit showing assent of more than two-thirds of the stockholders to the change of the Fort Dodge & Fort Ridgely Railroad and Telegraph Company to the Fort Dodge & Fort Ridgely Railroad Company.

STATE OF IOWA, } ss:
Webster County, }

I, George W. Bassett, vice-president of said company, acting president in the absence of the president, and Gus. T. Peterson, secretary, being first duly sworn on oath, do depose and say, that at a meeting of the stockholders of the Fort Dodge & Fort Ridgely Railroad and Telegraph Company held at their office in Fort Dodge, Iowa, on the 27th day of November, A. D. 1878, at 2 o'clock p. m., the name of the said railroad and telegraph company was changed by
151 striking out the words "and telegraph" therefrom making the said name Fort Dodge & Fort Ridgely Railroad Company

and that over two-thirds of the stockholders were present and over two-thirds of the stockholders both in person and in value assented to such change and adopted the new name.

GEO. W. BASSETT.
GUS. T. PETERSON.

Sworn to and subscribed before me and in my presence by Geo. W. Bassett and Gus. T. Peterson, severally on this 27th day of November, A. D. 1878, as witness my hand and official seal the day and year last above written.

LEON VINCENT,
[SEAL.] *Notary Public, Webster Co., Iowa.*

STATE OF IOWA, }
Webster County, } ss:

Filed for record Nov. 29th, 1878, at 4.20 o'clock p. m., and recorded in Book No. One of Miscellaneous Records, pages 129, 130, 131.

JARED FULLER, *Recorder.*

STATE OF IOWA, ss:

Filed for record in the office of the secretary of state, November 30th, 1878, and recorded in Book "J," pages 522, 523, 524.

JOSIAH T. YOUNG,
Secretary of State.
FLETCHER W. YOUNG, *Deputy.*

152 Fort Dodge & Fort Ridgely Railroad Company.

We, the undersigned, being all the stockholders of the Fort Dodge & Fort Ridgely Railroad Company, do hereby make the following changes, alterations and additions to the articles of incorporation of the said railroad company as existing on the 10th day of September, A. D. 1880. That article II of said articles be amended by adding thereto the following, to wit: "Also to construct, operate and maintain a railroad line from the city of Fort Dodge in Webster county, Iowa, in a southerly direction to the south line of the State of Iowa, thence in a southerly direction through the State of Missouri to a point in or near Kansas City, Missouri, with a branch line running from some point on said above-described line in said State of Iowa, to, and into the city of Council Bluffs, in said State of Iowa."

That article IV be amended as follows: By increasing the amount of capital stock of said corporation in the sum of seven millions of dollars and increasing the amount of the authorized indebtedness of said corporation in the sum of five millions of dollars, as that when amended it will read as follows, to wit:

Article IV.

The capital stock shall be nine million dollars in shares of one hundred dollars each, to be called in at the rate of not exceeding ten per cent. monthly, as the board of directors may direct, and the indebtedness shall not at any time exceed six million dollars.

Also, that the following additional articles be added to said articles of incorporation, to wit:

153 Article IX.

At any and all meetings of the stockholders of said corporations any stockholder may vote by proxy, or agent duly constituted.

Article X.

These articles may be altered, amended or changed, by additions or otherwise, by a majority in interest of the stockholders voting therefor, at any meeting of such stockholders duly called in accordance with the by-laws of the corporation.

FIRST NATIONAL BANK, FORT DODGE,
By E. D. G. MORGAN, *Cas.*
E. E. PRUSIA.
I. GARMOE.
G. R. PEARSONS.
C. RANK.
R. W. JOHNSON.
W. M. GRANT.
P. C. HUDSON.
J. L. CHEYNEY.
J. M. MULRONEY.
D. K. LINCOLN.
C. C. WASHBURN.
CHAS. J. MARTIN.
CHAS. F. HATCH.
JOHN MARTIN.
A. McBANE.
M. P. HAWKINS.
W. D. WASHBURN.
GEO. W. BASSETT.
GEO. B. REYNOLDS.
J. K. SIDLE.
GEO. L. BROWN.
WALTER H. BROWN.

(Duly acknowledged.)

WEBSTER CO., }
Iowa. }

Filed for record this 27th day of December, A. D. 1880, at 3.30 o'clock p. m., and recorded in Book No. 1 of Miscellaneous Records on pages 215–216 inclusive.

C. ARNOLD, *Recorder.*

(Title of Action.)

Stipulation of Submission.

154 It is hereby stipulated and agreed by and between said plaintiff and said individual defendants above named that have appeared herein, to wit: William Strauss, William L.

Bull, Richard B. Hartshorne and Edwin Hawley, that the trial or hearing in the above-entitled action, that is about to occur before said court above named, now being set for November 13th, 1896, shall be confined to the issues joined between said plaintiff and the individual defendants above named, relative to the alleged individual liability of said defendants, or any of them, for the demand of said plaintiff, and that the trial and determination of the other issues involved in said action shall, without prejudice, await the determination of the issue of individual liability to be submitted as aforesaid; that upon the trial or hearing about to be had as aforesaid, counsel for plaintiff shall move for judgment against said individual defendants that have appeared herein, and each of them; and if, under the pleadings and stipulation between parties filed herein, it shall be determined that a liability exists upon the part of any of said individual defendants that have appeared as aforesaid to satisfy plaintiff's said demand, or any part thereof, said court shall order judgment against said defendants that have appeared as aforesaid, jointly and severally, for the whole amount due upon plaintiff's said demand, without any reference to determine or any other or further determination of the amount for which said defendants are respectively liable; and counsel for defendants shall move to dismiss said action as to said individual defendants; and if it be determined that no liability upon the part of any of said individual defendants to satisfy plaintiff's said demand ex-
155 ists, said court shall enter an order dismissing said action as to said individual defendants, but not otherwise.

The intention of this stipulation is that a hearing shall occur herein, whereupon a determination shall be had as to whether a liability now exists upon the part of any of said individual defendants that have appeared herein to satisfy plaintiff's said demand, or any part thereof. That if said question is determined affirmatively, an order for judgment shall be made against said individual defendants that have appeared herein, jointly and severally, for the full amount of plaintiff's said demand. That if said question is determined in the negative, said action shall, as to the individual defendants that are parties to this said action, be dismissed. But that, in either case, the right to move for a new trial and to appeal to the supreme court from any appealable decision of this court, shall be reserved to every party hereto.

F. W. M. CUTCHEON,
Attorney for Plaintiff.
ALBERT E. CLARKE AND
W. F. BOOTH,
Attorneys for Defendants William Strauss, William L. Bull, Richard B. Hartshorne, and Edwin Hawley.

(Filed Nov. 19, 1896.)

C. N. DICKEY, *Clerk,*
By H. J. ALTNOW, *Deputy.*

156 These findings of fact seem to be correct and I consent thereto.

ALBERT E. CLARKE,
Of Defendant-' Counsel.

Findings of Fact and Conclusions of Law.

This cause, so far as concerns the issues joined between the plaintiff and the individual defendants above named that have appeared herein, relative to the individual liability of said defendants, or any of them, for the debts of said Minneapolis & St. Louis Railway Company, and particularly to satisfy the demand of the plaintiff herein, upon the facts appearing herein, came on to be tried at the September, 1896, general term of this court, and was tried before the undersigned judge of said court without a jury, and, by stipulation between the counsel, upon the pleadings and agreed statements of facts, contained in two stipulations between the parties, dated November 10th, 1896, and November 18th, 1896, respectively, and filed in this action, no other evidence being offered upon behalf of any party, the plaintiff appearing by his counsel, F. W. M. Cutcheon, Esq., and the defendants, The Minneapolis & St. Louis Railway Company, William Strauss, William L. Bull, Richard B. Hartshorne and Edwin Hawley, by their counsel, Albert E. Clarke, Esq., and W. F. Booth, Esq., and after examining the proofs and hearing arguments of counsel, I do find the facts herein to be as follows:

157 The defendant, The Minneapolis & St. Louis Railway Company, is a domestic railroad corporation of this State.

During the year 1853, by an act of the legislature of the Territory of Minnesota, approved March 3d, 1853, entitled, "An act to incorporate the Minnesota Western Railroad Company," there was incorporated the Minnesota Western Railroad Company, which continued to be known by said name until on or about the 26th day of May, A. D. 1870, on which day its board of directors, by resolution duly adopted, and proceeding under the authority conferred by an act approved February 4th, 1870, amendatory of said original act, and entitled "An act to amend an act to incorporate the Minnesota Western Railroad Company," lawfully changed the name of said corporation to the Minneapolis & St. Louis Railway Company, by which name it was thereafter lawfully and commonly known. On or about the 20th day of April, 1881, said corporation, proceeding in accordance with the provisions of another act of the legislature of the State of Minnesota, approved March 2d, 1881, and entitled "An act to amend an act entitled 'An act to incorporate the Minnesota Western Railroad Company,' approved March third (3d), one thousand eight hundred and fifty-three (1853), and the act amendatory thereof, approved February fourth (4th), eighteen hundred and seventy (1870," did duly enter into an agreement (called "articles of consolidation") with certain other corporations, to wit: the Minneapolis & Duluth Railroad Company, the Minnesota & Iowa Southern Railroad Company, and the Fort Dodge & Fort

Ridgely Railroad Company, by and under the terms of which all said corporations above mentioned agreed to make a full and
158 complete consolidation and amalgamation of all said corporations and their respective stocks, franchises, property, earnings and management in accordance with the provisions of said act of March 2d, 1881, under the name of the Minneapolis & St. Louis Railway Company, which said agreement was and did take effect June 1st, 1881. Thereafter said contracting companies filed their said articles of consolidation as provided by said act of the legislature of Minnesota of March 2d, 1881, a true copy of which said agreement and articles of consolidation is attached to the amended complaint of the plaintiff herein, and is hereby referred to. Thereafter and on or about said June 1st, 1881, said consolidation was duly consummated, each of said constituent companies conveying and transferring unto said consolidated corporation their respective stocks, franchises, rights, property and earnings, in accordance with the provisions of said act of March 2d, 1881. Thereafter said consolidated company, thus constituted, entered upon, and ever after until the 2d day of November, 1894, enjoyed the franchises, rights, property and earnings of its said constituent corporations conveyed as aforesaid. Said consolidated corporation is the defendant corporation, The Minneapolis & St. Louis Railway Company above named.

The Minneapolis & St. Louis Railway Company referred to in the consolidation agreement above mentioned as one of the contracting corporations, parties thereto, was that certain railroad corporation, of the State of Minnesota, incorporated as above stated, under the name of the Minnesota Western Railroad Company. The
159 Minneapolis & Duluth Railroad Company, party to said consolidation agreement, was an organization created under an agreement, a true copy of which is attached to the stipulation of facts filed herein and dated November 18th, 1896. The line of road constructed by said Minneapolis & Duluth Railroad Company was one of the lines of road which the Minnesota Western Railroad Company was authorized to build, and was built under an agreement, a true copy of which is attached to said stipulation of November 18th, 1896.

The other two constituent companies, parties to said consolidation agreement, viz., the Fort Dodge & Fort Ridgely Railroad Company and the Minnesota & Iowa Southern Railroad Company, were at and previous to the execution of said consolidation agreement, railroad corporations of the State of Iowa. True copies of the articles of incorporation of said two last-named railroad companies are attached to said stipulation of November 18, 1896.

At the time of the incorporation of said two last-named railroad companies in the State of Iowa, the law of said State of Iowa authorized the incorporators of railroad companies to exempt themselves from personal liability for the corporate debts by embodying in the articles of incorporation an article or provision declaring said exemption.

Said defendant corporation, The Minneapolis & St. Louis Railway

Company, was invested by said acts above mentioned and the laws and statutes of said Territory and State of Minnesota, with
160 the usual and general powers of a body corporate, and especially was empowered to construct, maintain and operate a railroad with a single or double track from Stillwater, on Lake St. Croix, to the city of St. Anthony, on the Mississippi river, both in Minnesota, and thence across said river to the city of Minneapolis, in said State, to a convenient point of junction with the Mississippi Valley railroad or the Hastings & Dakota railroad, or both, besides eight branches.

Said Minneapolis & St. Louis Railway Company did not, nor did its constituent company, known first as the Minnesota Western Railroad Company and afterwards as the Minneapolis & St. Louis Railway Company, take any steps toward constructing or acquiring any line of railway until after the 6th day of March, 1869.

The actual construction of a line of railway by the Minneapolis & St. Louis Railway (Minnesota Western) Company was commenced during the summer and fall of 1870, since which time said company, or the said consolidated company, has at all times operated and maintained a line of railway in the State of Minnesota.

On and prior to the 28th day of June, A. D. 1888, said defendant, The Minneapolis & St. Louis Railway Company, owned and operated a system of railroads in the States of Minnesota and Iowa, extending from Minneapolis through Hopkins, Merriam junction and Albert Lea, Minnesota, and Fort Dodge, Iowa, to Angus, in the State of Iowa, with a branch line from Hopkins, via Winthrop, Minnesota, to Morton, in said last-named State. Said railway
161 company also owned a line of railway extending from Minneapolis to White Bear, in the State of Minnesota, which was leased to and operated by the St. Paul & Duluth Railroad Company.

On said day last mentioned, said defendant railway had executed three (3) mortgages, securing bonds there-fore issued and varying in amount, which said mortgages, and six others, were liens upon different portions of said lines of railway. Said three mortgages were the following:

1. A mortgage executed by said defendant, The Minneapolis & St. Louis Railway Company, to the Central Trust Company of New York City, commonly called the Pacific Extension mortgage, dated June 1st, 1881, securing outstanding bonds of the aggregate par value of one million three hundred and eighty-two thousand dollars ($1,382,000), together with interest thereon at the rate of six (6) per cent. per annum, which said mortgage was and still is a lien upon those portions of the railway of said defendant, Minneapolis & St. Louis Railway Company, extending from Minneapolis to Hopkins, Minnesota, and from Hopkins, Minnesota, to Morton, Minnesota.

2. Another mortgage executed by said defendant, The Minneapolis & St. Louis Railway Company, to said Central Trust Company of New York City, commonly called the consolidated mortgage, dated January 2d, 1882, securing outstanding bonds of the aggregate par value of one hundred and eight thousand dollars ($108,000),

together with interest thereon at the rate of six (6) per cent.
162 per annum, which said mortgage was and still is a lien upon those portions of the railway of said defendant, Minneapolis & St. Louis Railway Company extending from Minneapolis to White Bear, in Minnesota, and from Minneapolis, via Merriam junction, to Albert Lea, Minnesota, and from the southern boundary of the State of Minnesota, via Fort Dodge, Iowa, to Angus, Iowa, and from Hopkins, Minnesota, to Morton, Minnesota.

3. Another mortgage executed by said Minneapolis & St. Louis Railway Company to said Central Trust Company of New York City, commonly called the improvement and equipment mortgage, dated October 12th, 1882, securing outstanding bonds of the aggregate par value of three million eight hundred and eighty-seven thousand dollars ($3,887,000), together with interest thereon at the rate of six per cent. per annum, which said mortgage was a lien upon those portions of the railway of said defendant, Minneapolis & St. Louis Railway Company, extending from Minneapolis to White Bear, in Minnesota, and from Minneapolis, via Merriam junction and Albert Lea, Minnesota, and Fort Dodge, Iowa, to Angus, Iowa, and from Hopkins to Winthrop, Minnesota, as well as upon all, or substantially all, the equipment and movable property of said defendant, The Minneapolis & St. Louis Railway Company.

(Under the terms of the stipulation of submission herein, the court is not called upon to determine whether this improvement and equipment mortgage covered that portion of the railway of said defendant, The Minneapolis & St. Louis Railway Company,
163 extending from Winthrop to Morton, Minnesota. A determination of that question is not necessary to a decision of this case, and I accordingly make no finding upon that point at this time.)

Each of said mortgages, above referred to, was on said day, and (with the exception of said improvement and equipment mortgage) still is, a lien upon the portion or portions of said railway covered by it, superior in equity to the lien of any and every mortgage subsequent to it in date.

Prior to said 28th day of June, 1888, said Central Trust Company of New York was duly removed as trustee of the trust created by the mortgage above mentioned, known as the improvement and equipment mortgage, and Henry Seibert, of New York, was duly appointed trustee thereunder as its successor and in its place and stead, and forthwith entered upon the discharge of the duties of his said trust.

On said 28th day of June, 1888, said Henry Seibert, as trustee under said improvement and equipment mortgage, duly commenced an action in this said court, wherein said Seibert, as such trustee, was plaintiff, and said defendant, The Minneapolis & St. Louis Railway Company, and others were defendants, for the purpose of foreclosing said improvement and equipment mortgage, and of securing a sale in said action of all the franchises, rights, property and estates upon which the same was a lien or charge. Such

proceedings were had in said action that thereafter, and on said 28th day of June, 1888, by an order of this said court, entered in said action, a receiver was appointed in aid of such foreclos-
164 ure of all the property, railway, franchises, rights and estates of said defendants. The Minneapolis & St. Louis Railway Company, which said receiver forthwith qualified and thereupon took possession of all the property, railway, franchises, rights and estates of said railway company, and thereafter continued to hold and operate the same until the 2d day of November, A. D. 1894. Said action was not in any respect a winding-up action or a sequestration, insolvency or bankruptcy proceeding.

Thereafter such proceedings were had in said foreclosure action that on the 29th day of June, 1893, an interlocutory decree was entered in said action, whereby it was ordered and decreed that said improvement and equipment mortgage be foreclosed and that all the property, railway, franchises, rights and estates, upon which said improvement and equipment mortgage was then a lien, but none other, should be sold at judicial sale, at the time and in the manner therein provided, in case no redemption thereof should be made as therein provided. No redemption of said property, railway, franchises, rights or estates having been made, as in said decree provided, all said property, railway, rights, franchises, and estates upon which said improvement and equipment mortgage was a lien or charge, but none other, were, under and in accordance with the provisions of said interlocutory decree, offered for sale upon the 11th day of October, 1894, and then and there sold by the sheriff of Hennepin county, Minnesota, to F. P. Olcott, as chairman of a committee organized to purchase said property, and thereupon a
165 certificate of such sale was duly executed and delivered by said sheriff to said Olcott, as such chairman. Thereafter, and upon the 31st day of October, 1894, said sale was duly confirmed by this said court, and a final decree duly entered in said foreclosure action, adjudging the title to the railway, property, franchises, rights and estates so sold to be in the assignees (hereinafter referred to) of said Olcott, purchaser at said foreclosure sale.

In said foreclosure action all amounts due upon any and all the bonds and coupons secured by said improvement and equipment mortgage, and all indebtedness secured thereby, were fully paid and satisfied.

Immediately after said foreclosure sale, said F. P. Olcott, as chairman of said committee of purchasers, sold and assigned to divers persons said certificate of sale and all right, title and interest thereunder or by virtue of said sale arising, and his said assignees, pursuant to the statutes of the State of Minnesota, in such case provided, did, on or about the 2d day of November, 1894, organize and incorporate a railway company, called the Minnesota & St. Louis Railroad Company, which said The Minneapolis & St. Louis Railroad Company thereupon, as successor of said Minneapolis & St. Louis Railway Company, became invested with all the property, railway, franchises, rights, privileges, immunities and estates embraced in said improvement and equipment mortgage and sold as

aforesaid, and as such successor to said Minneapolis & St. Louis Railway Company, entered into and has ever since remained in possession of, operating and enjoying all said property, rights,
166 franchises and estates, the receiver appointed in said action then and there (that is, on or about the said 2d day of November, 1894,) delivering all of the same unto said The Minneapolis & St. Louis Railroad Company upon said 2d day of November, 1894.

At the same time that said receiver delivered said property and rights above mentioned and sold as aforesaid unto said The Minneapolis & St. Louis Railroad Company, said receiver delivered unto said railroad company, and said railroad company entered into possession of, and has ever since held, operated and enjoyed that portion of the line of railway of said defendant, The Minneapolis & St. Louis Railway Company, extending from Winthrop to Morton, in the State of Minnesota. Said railroad company is now, and ever since said 2d day of November, 1894, has been in possession of and enjoying that portion of said railway under either title or claim of title to the same by virtue of said foreclosure sale, made as above stated in said foreclosure action above mentioned. Said receiver of said Minneapolis & St. Louis Railway Company no longer has any portion of the railway, property, franchises, rights or estates of said defendant, The Minneapolis & St. Louis Railway Company, in his hands. Said receiver has, so far as the custody, care or control of any part of the estate of said Minneapolis & St. Louis Railway Company is concerned, entirely discharged his trust, and is no longer entitled to take or hold any part of said estate.

On the 27th day of December, 1887, Revilo F. Parshall in
167 an action then pending in the circuit court of the United States, for the district of Minnesota, and brought to recover damages for personal injuries suffered by said Parshall in consequence of the negligence of said defendant railway company, said court then and there having jurisdiction of all the parties and of the subject-matter of said action, wherein said Revilo F. Parshall was plaintiff and said defendant herein, Minneapolis & St. Louis Railway Company, was defendant, recovered a judgment against said defendant, Minneapolis & St. Louis Railway Company, for the sum of eight thousand seven hundred and nineteen dollars and ten cents ($8,719.10), which said judgment was then and there duly entered in said action. Upon said 27th day of December, 1887, said judgment was duly docketed in the office of the clerk of said circuit court of the United States for the district of Minnesota. Said judgment is wholly unpaid. Said judgment so entered in said action and described as aforesaid, has not been in any way reversed, modified or superseded, and there is no appeal or writ of error or other proceeding pending upon which said judgment can be reviewed, but said judgment is still in full force and effect, and is now final and conclusive.

After the rendition, entry and docketing of said judgment against said defendant, Minneapolis & St. Louis Railway Company, said defendant secured a stay of proceedings and of execution in said action wherein said Parshall was plaintiff and said railway company was

defendant, for the purpose of providing time within which to
168 have settled a bill of exceptions therein, and to make a motion therein for a new trial of said action, and thus delayed said action until after the commencement of the foreclosure action, begun as aforesaid, and the appointment of a receiver therein, so that when said stay of proceedings was vacated by the order of said United States circuit court, as it was thereafter vacated, it was impossible, and has ever since been impossible, to enforce said judgment or execution upon it or to realize thereupon, against or out of the estate of said railway company, for the reason that all the property of said defendant corporation upon which execution could have been levied was at the time of the vacation of said stay, and ever since has been, in the custody of said receiver, or in the hands of the Minneapolis & St. Louis Railroad Company.

After the entry of said judgment in favor of said Parshall and before the commencement of this action, a writ of execution in due form of law, out of and under the seal of said United States circuit court for the district of Minnesota, subscribed by the clerk of said court, and attested in the name of the Chief Justice of the Supreme Court of the United States, duly endorsed, directed and delivered to the United States marshal for said district of Minnesota, was duly issued against the property of said defendant, Minneapolis & St. Louis Railway Company, and thereafter and before the commencement of this action, and on or about the 5th day of October, A. D. 1892, was returned into said court wholly unsatisfied, and said execution is the only execution ever issued upon said judgment.
169 Said judgment does yet remain and is wholly unsatisfied and unpaid. There is now due and owing upon said judgment said sum of eight thousand seven hundred and nineteen dollars and ten cents ($8,719.10), with interest from the 27th day of December, 1887, at the rate of seven (7) per cent. per annum.

On or about the 1st day of October, 1892, said Revilo F. Parshall duly sold said judgment, together with any and all sum or sums of money or other benefit or advantage that might be had or obtained by reason of the same, unto said plaintiff, Henry A. Gardner, and then and there duly executed unto said plaintiff an assignment of said judgment duly signed, sealed and acknowledged in accordance with law, which said assignment of judgment was heretofore, and on the 18th day of October, A. D. 1895, duly filed in the office of the clerk of said United States circuit court for the district of Minnesota. Plaintiff is, and ever since said 1st day of October, A. D. 1892, has been the owner of and entitled to said judgment and all benefit or advantage to be had or obtained by reason thereof, and to enforce the same by execution or otherwise, and to prosecute any and all legal proceedings upon said judgment, and to give good and sufficient releases and discharges, as fully as might have been done by said Revilo F. Parshall while said Parshall owned and held said judgment.

Said Minneapolis & St. Louis Railway Company is wholly insolvent, and, unless it be said portion of said railway extending from

Winthrop to Morton as aforesaid, has not, and since said foreclosure sale has not had, any money or property whatsoever.

170 Said portion of said railway extending from Winthrop to Morton aforesaid, consists of road-bed, rails, yards, station grounds, station-houses, bridges, culverts and such other lands and structures only as constitute a part of the corpus of the railway of said Minneapolis & St. Louis Railway Company, and the same and all thereof are necessary in the operation of said railway.

Said Pacific Extension mortgage and said consolidated mortgage are still liens upon said portion of said railway, and said mortgages still secure, respectively, all the bonds secured by them upon said 28th day of June, 1888, and in consequence any sale of said portion of said railway upon execution, if the same could be had, would be ineffectual, inasmuch as only a nominal sum could be realized upon such sale.

At the time of and after the entry of the plaintiff's said judgment as aforesaid, and until at least November 2d, 1894, each of a large number of persons, copartnerships and corporations held shares of the capital stock of said defendant, The Minneapolis & St. Louis Railway Company. The names of many of such shareholders are to plaintiff unknown, and plaintiff has no knowledge or information as to the names of or number of shares held by any one of the persons, copartnerships or corporations that have been or are such shareholders respectively, save as hereinafter stated.

Among those who have been since prior to November 2d, 1894, and still are shareholders in defendant, The Minneapolis & St. Louis Railway Company, are the defendants above named, to wit,

171 William L. Bull, August Belmont, Edwin Hawley, Frederick P. Olcott, Richard B. Hartshorne, William A. Read, J. Kennedy Tod, and William Strauss.

Each of said shareholders above named, except Edwin Hawley, acquired all the shares of stock in said Minneapolis & St. Louis Railway Company held by him, as hereinafter stated, subsequently to April 26th, 1891. Said Hawley acquired 600 shares of his said stock November 10th, 1884, 100 shares February 4th, 1885, 300 shares June 24th, 1889, 1,100 shares July 20th, 1892.

Said individual defendants above named, since about April 26th, 1891, have held, and still hold, the number of shares of stock in said defendant, The Minneapolis & St. Louis Railway Company, next hereinafter set opposite their names respectively, which said shares are of the par value of one hundred dollars ($100) each:

William L. Bull	200	shares.
August Belmont	100	"
Edwin Hawley	2,100	"
Richard B. Hartshorne	100	"
F. P. Olcott	10,623	"
W. A. Read	4,720	"
William Strauss	2,200	"
J. Kennedy Tod	2,900	"

All said defendant shareholders who join in answer to plaintiff's amended complaint are residents of the State of New York, and have been such since a time prior to December 27th, 1897, and during all said period have been out of the State of Minnesota.

Said Henry A. Gardner and Revilo F. Parshall, his assignor, have never at any time been citizens or residents of the State of Minnesota.

172 Said Henry A. Gardner is and has been at all times since the judgment referred to in said complaint was assigned to him by said Revilo F. Parshall, a citizen and resident of the State of Illinois.

The said Revilo F. Parshall was at all times prior to his death a citizen and resident of the States of Wisconsin and Illinois, and was at the time of his death a citizen and resident of the State of Illinois.

The statutes of limitations of the State of New York are as recited in the amendment to the answer of the defendants William Strauss, William L. Bull, Richard B. Hartshorne and Edwin Hawley, filed therein.

As conclusions of law, I find:

I.

That each of the defendants that have appeared herein, viz: William Strauss, William L. Bull, Richard B. Hartshorne and Edwin Hawley, is liable for all the debts of said defendant, The Minneapolis & St. Louis Railway Company, to an amount not exceeding the par value of the stock held by him in said defendant corporation as above stated, and therefore, that said defendants last named are, and each of them is, liable to satisfy plaintiff's demand herein, or some part thereof.

II.

That, in consideration of the facts found as aforesaid, and of the stipulation of submission between the parties hereto filed

173 herein, plaintiff is entitled to recover from said defendants, William Strauss, William L. Bull, Richard B. Hartshorne, and Edwin Hawley, jointly and severally, the sum of eight thousand seven hundred and nineteen dollars and ten cents ($8,719.10), with interest thereon at the rate of seven (7) per cent. per annum from the 27th day of December, 1887, to the date of the entry of such judgment.

Let judgment be entered accordingly.

Dated, Minneapolis, April 6th, 1897.

HENRY C. BELDEN,
District Judge.

(Title of Action.)

SIR: Please take notice that the settled case and bill of exceptions proposed by the above-named defendants, which is herewith served upon you, together with such amendment as may be proposed by you, will be presented to the Honorable Henry C. Belden, judge of

said district court, at the court-house, in the city of Minneapolis, county of Hennepin, and State of Minnesota, on the 8th day of May, 1897, at 9 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, at a special term of said court then and there to be held, for the allowance and settlement of the proposed case and bill of exceptions, and for the certificate and signature of said judge thereto.

You will also please take notice that then and there and immediately after the allowance and settlement of said case and
174 bill of exceptions and the signature of said judge thereto, the defendants will, upon the pleadings, files and all proceedings had in said action, move the court for a new trial thereof upon the following grounds:

1. That the conclusions of law are not justified by the evidence.

2. That the conclusions of law are not justified by the findings of fact and are contrary to law.

Dated this 3d day of May, A. D. 1897.

To F. W. M. Cutcheon, Esq., attorney for plaintiff.

ALBERT E. CLARKE AND
W. F. BOOTH,
Attorneys for Defendants, 1104 *Guaranty Loan Building, Minneapolis, Minn.*

The case as settled and certified consisted of the two stipulations of facts, with the exhibits attached thereto, stipulation of submission, findings of fact and conclusions of law found by the judge on the trial, and which have been heretofore set forth in folios 322 to 605 inclusive.

(Title of Action.)

Order.

The above-entitled action came before the court on a motion by the defendant for a new trial on the grounds set forth in the notice of motion.

Messrs. Albert E. Clarke and W. F. Booth appeared as at-
175 torneys for the defendant in support of the said motion, and Messrs. Flandrau, Squires & Cutcheon as attorneys for the plaintiff in opposition thereto.

Now, after hearing the arguments of counsel and considering the same together with the files and records, it is ordered that the said motion be and the same hereby is denied.

By the court:

SEAGRAVE SMITH,
CHARLES B. ELLIOTT,
DAVID F. SIMPSON, *Judges.*

February 7th, 1898.

Endorsed: Filed Feb. 8, 1898. C. N. Dickey, clerk, by H. J. Altnow, deputy.

(Title of Cause.)

Judgment, March 23d, 1898.

The above-entitled action having been regularly placed upon the calendar of the above-named court for the September, A. D. 1896, general term thereof, came on for trial before the court, without a jury, on the 19th day of November, A. D. 1896, so far as it concerned the issues joined between plaintiff and the individual defendants above named that have appeared herein, upon the pleadings and the agreed statement of facts filed herein, and the court, after hearing the evidence adduced at said trial and
176 being fully advised in the premises, did, on the 6th day of April, A. D. 1897, duly make and file its findings and order for judgment herein.

Now, pursuant to said order and on motion of F. W. M. Cutcheon, Esq., attorney for plaintiff, it is hereby adjudged that the plaintiff recover of the defendants, William Strauss, William L. Bull, Richard B. Hartshorne, and Edwin Hawley, jointly and severally, and each of them, the sum of fourteen thousand nine hundred sixty-eight and $\frac{27}{100}$ dollars, the amount ordered, and interest to date hereof, together with the sum of nineteen and $\frac{68}{100}$ dollars costs and disbursements as taxed and allowed herein, amounting in the whole to the sum of fourteen thousand nine hundred eighty-seven and $\frac{95}{100}$ dollars ($14,987.95).

By the court:

C. N. DICKEY,
Clerk of District Court,
By W. E. MACDONALD, *Deputy.*

Judgment filed and docketed March 23d, 1898.

(Title of Action.)

Notice of Appeal.

To F. *M.* M. Cutcheon, Esq., attorney for the above-named plaintiff, and to C. N. Dickey, Esq., clerk of said district court.

GENTLEMEN: Please take notice that William Strauss, William L. Bull, Richard B. Hartshorne and Edwin Hawley, of the
177 above-named defendants, hereby appeal to the supreme court of the State of Minnesota, from that certain judgement of said district court entered herein on the 23d day of March, 1898, against said William Strauss, William L. Bull, Richard B. Hartshorne and Edwin Hawley, both severally and jointly, for the sum of fourteen thousand nine hundred eighty-seven and $\frac{95}{100}$ dollars, and from the whole of said judgment.

ALBERT E. CLARKE AND
W. F. BOOTH,
Attorneys for the Appellants Above Named.

Dated this 24th day of March, A. D. 1898.

Undertaking on appeal duly approved, served and filed.

178 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898.

HENRY A. GARDNER, Respondent,
vs.
MINNEAPOLIS & ST. LOUIS R'Y CO. ET AL., Defendants; Wm. Strauss *et al.*, Appellants.

11199.
No. 249. Syllabus.

The Minneapolis & St. Louis Railway Company was not the same corporation that was created by the territorial act of 1853, entitled An act to incorporate the Minnesota Western Railroad Company, but a new corporation, created and organized under Special Laws of 1881, chapter 113, and hence the stockholders were subject to the personal liability imposed by the constitution, art. 10, sec. 3.

Having accepted the benefits of the act of 1881 by organizing, issuing stock, and doing business as a corporation under it, the stockholders are estopped from asserting the unconstitutionality of the act.

Judgment affirmed.

179 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898.

HENRY A. GARDNER, Respondent,
vs.
MINNEAPOLIS & ST. LOUIS R'Y CO. ET AL., Defendants; Wm. Strauss *et al.*, Appellants.

11199.
No. 249. Opinion.

One of the defendants, The Minneapolis & St. Louis Railway Company, is a domestic railroad corporation and located within this State and is insolvent. The defendants who answered are William L. Bull, Richard B. Hartshorne, Edwin Hawley, and William Strauss. The plaintiff Gardner brought the action in behalf of himself, and other creditors who might intervene, against the defendants for the purpose of enforcing an alleged double liability on the part of certain stockholders, individual defendants above named, and on March 23, 1898, obtained a judgment in the district court of Hennepin county in his favor and against the above-named answering defendants for the sum of $14,987.95. The facts were all stipulated, and the appeal is from the judgment.

It appears from the record that during the year 1853 the Minnesota Western Railroad Company was incorporated by an act of the legislature of the Territory of Minnesota entitled "An act to incorporate the Minnesota Western Railroad Company, approved March 3, 1853," which railroad company continued to be known by said name until on or about the 25th day of May, 1870, when its board of directors, under authority conferred upon it by an act of the legislature approved February 4, 1870, lawfully changed the name of the corporation to the Minneapolis & St. Louis Railway Company, by which name it was thereafter commonly known.

180 On or about the 20th day of April, 1881, said corporation, proceeding under and in accordance with the provisions of another act of the legislature of the State of Minnesota, approved March 2nd, 1881, and entitled "An act to amend an act entitled 'An act to incorporate the Minnesota Western Railroad Company,' approved March third (3rd), one thousand eight hundred and fifty-three (1853), and the act amendatory thereof, approved February fourth (4th), eighteen hundred and seventy (1870)," did duly enter into an agreement with certain other corporations, to wit, the Minneapolis and Duluth Railroad Company, the Minnesota and Iowa Southern Railroad Company, and the Fort Dodge and Fort Ridgley Railroad Company, by and under the terms of which all said corporations above mentioned agreed to make a full and complete consolidation and amalgamation of all said corporations and their respective stocks, franchises, property, earnings, and management, in accordance with the provisions of said act of March 2nd, 1881, under the name of the Minneapolis & St. Louis Railway Company, which said agreement was to and did take effect June 1st, 1881. Thereafter said companies filed their said articles of consolidation as provided by said act of the legislature of Minnesota of March 2nd, 1881, and on or about said June 1st, 1881, said consolidation was duly consummated, each of said constituent companies in form conveying and transferring unto said consolidated corporation their respective stocks, franchises, rights, property, and earnings in accordance with the provisions of said act of March 2nd, 1881. Thereafter said consolidated company entered upon and ever after until the 2nd day of November, 1894, enjoyed the franchises, rights, property, and earnings of its said constituent corporations conveyed as aforesaid. Said consolidated corporation is the defendant corporation, The Minneapolis & St. Louis Railway Company, above named.

181 Said defendant corporation, The Minneapolis & St. Louis Railway Company, was invested by said acts above mentioned and the laws and statutes of said Territory and State of Minnesota with the usual and general powers of a body incorporate, and especially was empowered to construct, maintain, and operate a railroad, with a single or double track, from Stillwater, on Lake St. Croix, to the city of St. Anthony, on the Mississippi river, both in Minnesota, and thence across said river to the city of Minneapolis, in said State, to a convenient point of junction with the Mississippi Valley railroad or the Hastings & Dakota railroad, or both, besides eight branches.

On and prior to the 28th day of June, A. D. 1888, said defendant, The Minneapolis & St. Louis Railway Company, owned and operated a system of railroads in the States of Minnesota and Iowa extending from Minneapolis through Hopkins, Merriam junction, and Albert Lea, Minnesota, and Fort Dodge, Iowa, to Angus, in the State of Iowa, with a branch line from Hopkins, via Winthrop, Minnesota, to Morton, in said last-named State. Said railway company also owned a line of railway extending from Minneapolis to

White Bear, in the State of Minnesota, which was leased to and operated by the St. Paul & Duluth Railroad Company.

On said day last mentioned said defendant railway had executed three (3) mortgages securing bonds theretofore issued and varying in amount, which said mortgages and six others were liens upon different portions of said lines of railway.

The mortgages amounted in the aggregate to several millions of dollars, and in addition to said mortgages above described and mentioned, there existed upon said 28th day of June, 1888, a number of contracts of various kinds, to wit, construction contracts, traffic agreements, trackage agreements, leases, etc., which upon said day constituted liens upon the lines of said defendant, The Minneapolis & St. Louis Railway Company.

182 Subsequently this railroad became insolvent, and a receiver thereof was duly appointed on the 28th day of June, 1888, who took possession of all the property, railway, franchises, rights, and estates of said railroad company and continued the certain foreclosure proceedings against said company which had previously been commenced, and thereafter such proceedings were had in said foreclosure action that on the 29th day of June, 1893, an interlocutory decree was entered in said action, whereby it was ordered and decreed that said improvement and equipment mortgage be foreclosed, and that all the property, railway, franchises, rights, and estates upon which said improvement and equipment mortgage was then a lien, but none other, should be sold at judicial sale, at the time and in the manner therein provided, in case no redemption thereof should be made as therein provided. No redemption of said property, railway, franchises, rights, or estates having been made as in said decree provided, all said property, railway, rights, franchises, and estates upon which said improvement and equipment mortgage was a lien or charge, but none other, were, under and in accordance with the provisions of said interlocutory decree, offered for sale upon the 11th day of October, 1894, and then and there sold by the sheriff of Hennepin county, Minnesota, to F. P. Olcott, as chairman of a committee organized to purchase said property, and thereupon a certificate of such sale was duly executed and delivered by said sheriff to said Olcott, as such chairman. Thereafter and upon the 31st day of October, 1894, said sale was duly confirmed by this said court and a final decree duly entered in said foreclosure action adjudging the title to the railway, property, franchises, rights, and estates so sold to be in the assignees of said Olcott, purchaser at said foreclosure sale.

In said foreclosure action all amounts due upon any and all the bonds and coupons secured by said improvement and equipment mortgage and all indebtedness secured thereby were fully

183 paid and satisfied.

Immediately after said foreclosure sale said F. P. Olcott, as chairman of said committee of purchasers, sold and assigned to divers persons said certificate of sale and all rights, title, and interest thereunder or by virtue of said sale arising, and his said assignees, pursuant to the statutes of the State of Minnesota in such

case provided, did, on or about the 2nd day of November, 18[illegible], organize and incorporate a railway company called the Minneapolis & St. Louis Railroad Company; which said Minneapolis & St. Louis Railroad Company thereupon, as successor of said Minneapolis & St. Louis Railway Company, became invested with all the property, railway, franchises, rights, privileges, immunities, and estates embraced in said improvement and equipment mortgage and sold as aforesaid, and as such successor to said Minneapolis and St. Louis Railway Company entered into and has ever since remained in possession of, operating, and enjoying all said property, rights, franchises, and estates.

On the 27th day of December, 1887, one Revilo F. Parshall, who was a citizen and resident of the State of Illinois, and never was a citizen of the State of Minnesota, in an action then pending in the circuit court of the United States for the district of Minnesota for personal injuries suffered by him in consequence of the negligence of said railway company, viz., the Minneapolis & St. Louis Railway Company, secured a judgment against said company for the sum of $8,719.10, which judgment was duly assigned to this plaintiff, who is the owner thereof, and the same is unpaid and in full force and effect. Said plaintiff has never been a resident of the State of Minnesota. By reason of a stay of execution and the appointment of a receiver of said railway company and its insolvency plaintiff has been unable to realize on said execution. Since the consolidation of said
184 several railroad companies under the name of the Minneapolis & St. Louis Railway Company it has been acting as a company and transacting a general railroad business under that name.

Between April 26, 1891, and November 2, 1894, the individual defendants held at least the number of shares in said defendant, Minneapolis & St. Louis Railway Company, next hereinafter set opposite their names respectively of the par value of $100 each, viz:

William L. Bull	200 shares.
Rachel B. Hartshorne	100 "
William Strauss	2,200 "

And Edwin Hawley acquired 600 shares of his stock November 10, 1884; 100 shares February 4, 1885; 300 shares June 24, 1889, and 1,100 shares July 20, 1892.

Upon the facts in the record it seems to us that there cannot be any serious question but that under Special Laws of 1881, ch. 113, the several railroads herein mentioned were authorized to merge and consolidate their capital, franchises, and property under the name of the Minneapolis & St. Louis Railway Company, and that as a matter of fact they did so and acted accordingly for many years. They certainly had the legal sanction of the legislature, and the essential steps necessary to effect a consolidation were taken, and whether all or any of the corporations so consolidated then had a legal existence as such cannot be contested and determined in a proceeding of this kind, but only in a direct proceeding instituted by the State.

Thompson's Commentaries on the Law of Corporations, sec. 315.

This consolidated company, duly organized as such, issued its stock and acted in the same manner as railroad companies created otherwise than by consolidation. Section eleven of the act provides that the new corporation shall possess all the powers, rights, and franchises conferred upon each of its constituent corporations,
185 and shall be subject to all the restrictions and duties imposed by the laws of this State, and section 14 of the act provides that "all the provisions of the general laws of this State in regard to railroad corporations shall be applicable to any new corporation formed by consolidation under the provisions of this act, except so far as the same shall not be applicable thereto by reason of the situation of portions of its lines without this State."

Railroad franchises are derived from the State, and where several have thus come into existence it needs but little, if any, argument to show that the power which authorized their creation may authorize their consolidation.

And a consolidation could not have been made without the consent of the shareholders. Having done this, the different branches were merged into a new corporation. "A consolidation involves the formation of a new company by the shareholders under a new constitution." Morawetz on Private Corporations, sec. 940. How can it be otherwise?

The various provisions of the several branches may be in sharp conflict, as was the case here between the exemption from double liability of the shareholders in the Iowa corporation and such liability under our constitution on the part of the Minnesota corporation. In consolidating, such corporations must necessarily yield some portions of its rights and assume other rights, powers, and obligations in the new one. The law authorizing the consolidation repeatedly refers to the corporation as a new one, and it was in this new one that the individual defendants took and held stock for which they are sued as being liable.

There can be no doubt that the general effect of the consolidation of several corporations by the shareholders into one is to create a new one. Whatever may be the liability of the
186 several corporations we need not enquire, because the liability here sought to be enforced is one against individuals who have been and are stockholders in the new corporation. It is immaterial whether they owned stock in one or more of the several corporations. They are charged with this double liability because they are found to own stock when the judgment was recovered against the new corporation, or at a time previous to the rendition of such judgment when such liability became fixed against them under the law. Nor does the mere fact that the stockholders in the Iowa corporation possessed immunities or exemptions from double liability continue that exemption if, upon coming into our State, it consolidated with a Minnesota corporation, because by its voluntary act in becoming a member of a new corporation here its rights therein would be measured by our laws, legislative and constitutional.

Assuming, therefore, that the Minneapolis & St. Louis Railway

Company was a new consolidated railroad corporation, the double liability clause of the constitution, art. 10, sec. 3, would be applicable.

Under this section each shareholder in any corporation is liable to the amount of stock held or owned by him, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business. This constitutional provision is very broad in its language, and includes each shareholder in any corporation except those specifically mentioned. A shareholder in a railroad corporation is not one of those exempted, but is included in the general language, viz., each shareholder in any corporation. Nor is there any sound reason why this double liability should not attach to shareholders in a railroad corporation.

187 They derive their franchises from the State, which gives them vast powers of a public nature and which are frequently of great value to them, and a corresponding responsibility should attach to those carrying on the business authorized by such franchises.

Now, let us more particularly refer to the contention of the defendant's counsel that if the special law of 1881 and the acts done thereunder were attempts to create a new corporation, then they would be absolutely void, because the constitution, art. 10, sec. 2, prohibits the formation of corporations under special acts except for municipal purposes. Suppose that the corporation was never legally organized, and that steps might have been legally taken to have prevented its acting even as a *de facto* corporation, can the promoters of this scheme, who organized it and have not only carried on its business as a *de facto* corporation, but claiming it to be one *de jure*, successively enter the plea that the act of 1881 was unconstitutional, and hence all acts done under it are invalid?

Since its formation, in 1881, it has acted openly in all respects as a corporation. It has borrowed money, giving security therefor upon the property of the new corporation, to the amount of millions of dollars, which it has presumably used for its own benefit.

It has operated its road, carrying freight and passengers and receiving large sums of money therefor. It made construction, traffic, and trackage agreements and various leases, and in all of these matters it participated in the benefits derived therefrom.

To all of these things the stockholders are presumed to have consented and to have had knowledge of such transaction- and enjoyed the fruits of them.

In the case of McCarthy *v.* Lavasche, 89 Ill., 270, a suit was brought by a creditor of the corporation to enforce the indi-

188 vidual liability of a shareholder for double the amount of his shares, and a defense was interposed that the act of the legislature under which the corporation had been formed was unconstitutional; but the supreme court held that the defendant was liable, saying that the appellant — approved of the act and availed himself of its benefits by subscribing for stock and becoming entitled to exercise all the rights and privileges of a stockholder in the corporation, justice, morality, public policy, and precedent all de-

mand that the appellant should be estopped from denying the constitutionality of the law.

In Michigan it was decided that a corporation which had not been properly organized under any existing law of that State could be sued upon a note which it had executed in its corporate name.

Empire Manufacturing Co. *v.* Stuart, 46 Mich., 482.

See also Minn. Gas-light Economizer Co. *v.* Denslow, 46 Minn., 171.

And we are of the opinion that plaintiff, as a creditor of the defendant railroad company, is entitled to enforce the individual liability of the answering stockholders, and that the principle of estoppel extends so far as to prevent them from setting up the invalidity of the charter as a defense.

Other questions have been raised and discussed by the respective counsel, but a decision upon them by this court in this action is entirely unnecessary, and we express no opinion thereon.

Judgment affirmed.

BUCK, *J.*

189 [Endorsed:] No. 11199. State of Minnesota supreme court. Henry A. Gardner, respondent, *vs.* Minneapolis & St. Louis R'y Co. *et al.*, appellants. Copy of opinion and syllabus. Filed August 12, 1898. D. F. Reese, clerk. April term, A. D. 1898. Buck, J.

190 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898.

HENRY A. GARDNER, Respondent,
vs.
MPLS. AND ST. LOUIS R'Y CO. ET AL., Defendants; WILLIAM STRAUSS, WILLIAM L. BULL, RICHARD B. HARTSHORN, and EDWIN HAWLEY, Appellants. } No. 249.

Pursuant to an order of court duly made and entered in this cause on the 26th day of August, A. D. 1898—

It is here and hereby determined and adjudged that the judgment of the court below, herein appealed from, to wit, of the district court of the fourth judicial district, sitting within and for the county of Hennepin, be, and the same hereby is, in all things affirmed; and it is further determined and adjudged that the respondent above named do have and recover of said William Strauss, William L. Bull, Richard B. Hartshorn, and Edwin Hawley, appellants herein, the sum and amount of one hundred and fifty dollars ($150.00), costs and disbursements in this cause in this court, and that said respondent have execution for the enforcement thereof.

Dated and signed this 26th day of August, 1898.

By the court.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

Statement for Judgment.

Costs allowed by statute	$25 00
Clerk's fees for making return	
Printer's fees	115 00
Clerk's fees, supreme court	10 00
Filing mandate	
Affidavits and acknowledgments	
Postage	
Copying returns for printer	
	$150 00

191 [Endorsed:] 11199. State of Minnesota, supreme court. Transcript of judgment. Filed August 26, A. D. 1898. D. F. Reese, clerk. —— ——, attorney for —. Page No. —, — book.

STATE OF MINNESOTA, *Supreme Court*, } ss:

I, D. F. Reese, clerk of said supreme court, do hereby certify that the foregoing is a full and true copy of the entry of judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original, and that the same is a correct transcript therefrom.

Witness my hand and the seal of said supreme court, at the capitol, in the city of St. Paul, this 26th day of August, A. D. 1898.

D. F. REESE, *Clerk.*

192 STATE OF MINNESOTA:

Supreme Court, April Term, A. D. 1898.

HENRY A. GARDNER, Respondent, *vs.* MPLS. AND ST. LOUIS R'Y CO. ET AL., Defendants; Wm. Strauss, Wm. L. Bull, Richard B. Hartshorn, and Edwin Hawley, Appellants. } No. 249. Appeal from District Court, Fourth Judicial District, County of Hennepin.

This cause having been duly argued and submitted at the general April term of this court, A. D. 1898, upon the return to the appeal herein:

Now, after full and mature deliberation had thereon, it is here and hereby ordered that the judgment of the court below, herein appealed from, be, and the same hereby is, in all things affirmed, and that the respondent above named have judgment accordingly.

Entered August 26, A. D. 1898.

By the court.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

I hereby certify that the foregoing is a full and true copy of the original order for judgment entered in the above-entitled cause.
Attest: D. F. REESE, *Clerk.*

193 [Endorsed:] No. 11199. State of Minnesota, supreme court. Copy of order for judgment. Filed Aug. 26, A. D. 1898. D. F. Reese, clerk. Entered on page —.

194 STATE OF MINNESOTA:

Supreme Court, General April Term, A. D. 1898.

Tuesday morning, 9.30 o'clock, July 12, A. D. 1898, court convened pursuant to adjournment, all the justices being present.

HENRY A. GARDNER, Respondent,
vs.
MPLS. AND ST. LOUIS R'Y CO., Defendants; WM. Strauss *et al.*, Appellants. } Cal. No., 249; Reg. No., 11199.

This cause came on to be heard this day upon the return to the appeal herein.
Thereupon the same was submitted to the court for decision upon paper book and briefs of counsel and taken under advisement.
A true record.

[Seal of the Supreme Court, State of Minnesota.]

Attest: D. F. REESE, *Clerk.*

The foregoing is a full and true copy of the minutes of argument in the above-entitled cause.
Attest: D. F. REESE, *Clerk.*

195 [Endorsed:] 11199. State of Minnesota, supreme court. Copy of minutes of argument. Filed August 26, A. D. 1898. D. F. Reese, clerk.

196 [Endorsed:] No. 11199. State of Minnesota, supreme court. Henry A. Gardner, respondent, against Mpls. and St. Louis R'y Co., appellants. Judgment-roll. Filed August 26, 1898. D. F. Reese, clerk,

197 STATE OF MINNESOTA, *Supreme Court,* } *ss:*

I, D. F. Reese, clerk of the supreme court of Minnesota, do hereby certify and return to the Supreme Court of the United States that the foregoing and annexed transcript of record is a full and complete transcript of the record in said court in the case of Henry A. Gardner, plaintiff and respondent, and The Minneapolis and St. Louis Railway Company, William L. Bull, August Belmont, Edwin Hawley, Richard B. Hartshorne, F. B. Olcott, W. A. Read, William Strauss, J. Kennedy Tod, and William D. Washburn, defendants and appellants, in said supreme court, including the pleadings, exhibits,

stipulations of fact, stipulations for the admission of the general and special acts of the legislature of the Territory and State of Minnesota, findings of fact and conclusions of law, judgment, judgment-roll, opinion of said supreme court in said cause, assignment of errors made and filed in said cause by the defendants and appellants, and all papers filed and proceedings had in said cause in said court.

I do further certify and return that I have annexed to said transcript and included therewith the original writ of error from the Supreme Court of the United States; the original citation issued therein, with proof of service thereon; also the original petition for the allowance of said writ of error, together with the assignment of errors, and a copy of the bond on said writ of error, and that the foregoing constitutes a full, true, and complete return to said writ of error.

I do further certify that section 3 of rule 9 of the supreme court of Minnesota is and has been at all times while said case was in said court as follows:

"Prefixed to the brief of the appellant, but stated separately, shall be the assignment of errors intended to be urged. Each specification of error shall be separately, distinctly and concisely stated, without repetition, and they shall be numbered consecutively. When the error specified is that the finding of the court below or referee is not sustained by the evidence, it shall specify particularly the finding complained of. No error not affecting the jurisdiction over the subject-matter shall be considered unless stated in the assignment of errors."

198 The assignment of errors incorporated in the foregoing record entitled "Assignment of errors made and filed by defendant and appellant in State supreme court" was duly made and filed in said State supreme court on the 11th day of June, 1898, prefixed to the brief of appellant, and stated separately in accordance with the rules of practice of said court in all things, and were a part of the record in said court upon which said cause was heard and determined.

In witness whereof I have hereunto set my hand and the seal of said supreme court of the State of Minnesota, at the capital, St. Paul, Minnesota, this 18th day of November, A. D. 1898.

[Seal of the Supreme Court, State of Minnesota.]

D. F. REESE,
Clerk Supreme Court of Minnesota,
By J. L. HELM, *Deputy.*

199 In the Supreme Court of the United States.

MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY, WILLIAM L. Bull, Edwin Hawley, Richard B. Hartshorne, August Belmont, F. B. Olcott, W. A. Read, William Strauss, J. Kennedy Tod, and William D. Washburn, Plaintiffs in Error,

vs.

HENRY A. GARDNER, Defendant in Error.

Stipulation.

It is hereby stipulated and agreed by and between the attorneys for the parties hereto:

1. The complete transcript of the proceedings in the State court as filed in the office of the clerk of this court shall be printed.

2. On pages 32, 33, and 35 of the Paper Book used in the supreme court of the State of Minnesota and filed in the office of the clerk of this court as a part of the transcript, the date showing the time when the consolidation agreement printed upon said pages shall go into effect is left blank; these blanks shall be filled by writing therein the words "first" and "June," so that the same shall read "after the first day of June." These blanks are found at subdivision 1, page 32, folio 126; subdivision 2, page 33, folio 129; subdivision 3, page 33, folio 130; subdivision 5, page 35, folio 139.

Before printing the record the clerk of the Supreme Court of the United States is authorized to fill in the blanks, as above stated.

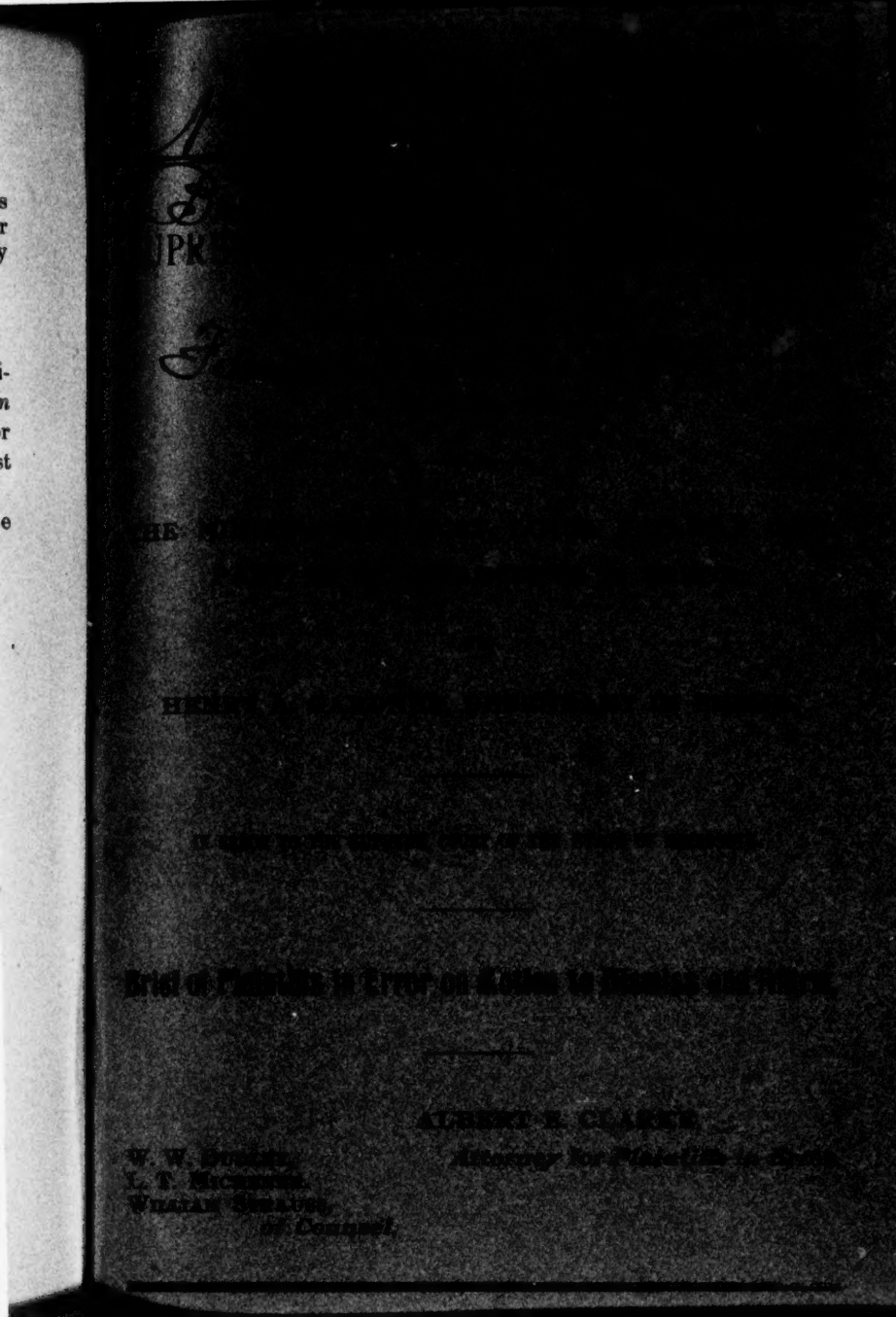
3. All special legislative acts and parts of acts dealing with said plaintiff in error, The Minneapolis and St. Louis Railroad Company, or the Minnesota Western Railroad Company, under whatsoever name, shall be considered as part of the record in this cause without being printed therein, as well as all general laws and constitutional provisions of the State of Minnesota, and may be read or referred to upon the hearing of this cause.

Dated December 20, 1898.

F. W. M. CUTCHEON,
Attorney for Defendant in Error.
ALBERT E. CLARKE,
Attorney for Plaintiffs in Error.

200 [Endorsed:] File No. 17,192. Supreme Court U. S., October term, 1898. Term No., 607. The Minneapolis & St. Louis R'y Co. *et al.*, P. E., *vs.* Henry A. Gardner. Stipulation to correct transcript of record, &c. Filed Dec'r 27, 1898.

Endorsed on cover: Case No. 17,192. Minnesota supreme court. Term No., 607. The Minneapolis & St. Louis Railway Company *et al.*, plaintiffs in error, *vs.* Henry A. Gardner. Filed November 21st, 1898.



ALBERT R. CLARKE
Attorney for Plaintiffs in Error
of Counsel.

SUPREME COURT OF THE UNITED STATES.

October Term, 1898

Term No. 607.

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, ET AL., PLAINTIFFS IN ERROR,

vs.

HENRY A. GARDNER, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR PLAINTIFF IN ERROR UPON MOTION TO DISMISS WRIT OF ERROR AND TO AFFIRM THE JUDGMENT.

Statement.

The Territory of Minnesota, by an act of its Legislative Assembly, approved March 3d, 1853, and various acts amendatory thereof, created aud incorporated the Minnesota Western Railroad Company.

Subsequently, by legislative authority, the corporate
2 name was changed to the Minneapolis & St. Louis Railway Company.

The Constitution of Minnesota was framed August 29th, 1857, adopted by a vote of the people October 13th, 1857, and the State admitted May 11th, 1858.

Section 2, Article 10, of the State Constitution provides that "no corporation shall be formed under special acts except for municipal purposes."

Section 3 of said Article 10 provides that "each stockholder in any corporation (except those organized for the pur-

pose of carrying on any kind of manufacturing or me-
3 chanical business) shall be liable to the amount of stock held or owned by him."

The State Legislature, by a special act approved March 2d, 1881, entitled "An act to amend an act entitled an act to amend an act entitled an act to incorporate the Minnesota Western Railroad Company, approved March third (3), one thousand eight hundred and fifty-three (1853), and the acts amendatory thereof, approved February fourth (4th), one thousand eight hundred and seventy (1870)," authorized the Minneapolis & St. Louis Railway Company to consolidate its capital, franchises and property with the capital stock,
4 franchises and property of any other railroad company or companies organized under the laws of the State of Minnesota, or under the laws of any other State or Territory within the United States, in the construction of whose lines the said Minneapolis & St. Louis Railway Company had aided, or whose lines of railroad then were, or should be at the time of such consolidation. held under lease by said Minneapolis & St. Louis Railway Company.

Section Twelve of said Special Act provides that "upon the consummation of said act of consolidation as aforesaid, all and singular the rights, privileges, exemptions and
5 franchises of each of said corporations, parties to the same * * * shall be taken and deemed to be transferred to, and vested in such new corporation without further act or deed."

Section Fourteen of the act provides that:—

"All provisions of the general laws of this State in regard to railroad corporations shall be applicable to any new corporations formed by consolidation under the provisions of this act, except so far as the same shall not be applicable thereto by reason of the situation of portions of its lines without this State, PROVIDED, THAT NEVERTHELESS, THE PRIVILEGES,
6 FRANCHISES, EXEMPTIONS AND IMMUNITIES HITHERTO GRANTED TO THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY SHALL CONTINUE TO AND BE VESTED IN SUCH NEW CORPORATION WITH THE SAME EFFECT AS IF ORIGINALLY GRANTED THERETO, and that such new corporation may at any time hereafter be consolidated with any other railroad company or companies in the same manner and with the same effect as is by this act provided."

The Minneapolis & St. Louis Railway Company accepted the act of 1881 and entered into a consolidation agreement during that year with the Minneapolis & Duluth Railroad Company, the Fort Dodge & Fort Ridgely Railroad
7 Company, and the Minnesota & Iowa Southern Railroad Company.

The Minneapolis & Duluth Railroad Company was a cor-

poration created under the same charter as the Minneapolis & St. Louis Railway Company, by authority of the Legislature of Minnesota. It was a corporation within the Minneapolis & St. Louis Railway Company, and is conceded to be subject to the same conditions as to liability of its stockholders as the last named company.

The Fort Dodge & Fort Ridgely Railroad Company and the Minnesota & Iowa Southern Railroad Company were both corporations of the State of Iowa, and by the terms of
8 their respective charters their stockholders were exempt from personal liability for corporate debts.

On December 27th, 1887, Revilo F. Parshall recovered a judgment against said Minneapolis & St. Louis Railway Company for personal injuries, in the sum of $8,719.10, which was duly docketed in the office of the Clerk of the Circuit Court of the United States, District of Minnesota, and was subsequently assigned to the defendant in error, Henry A. Gardner.

On July 28th, 1888, said Minneapolis & St. Louis Railway Company was by a court of competent jurisdiction adjudged to be insolvent, and has at all times since that date been
9 without assets from which said judgment could be collected.

The plaintiffs in error, William L. Bull, August Belmont, Edwin Hawley, Richard B. Hartshorne, F. B. Olcott, W. A. Read, William Strauss, J. Kennedy Tod and William D. Washburn, are stockholders in the insolvent corporation, the Minneapolis & St. Louis Railway Company.

This action was brought in the State court in accordance with the practice and statutes of Minnesota, to recover the amount of the judgment from the individual stockholders, and is a proceeding to enforce the constitutional liability of stockholders.

Said stockholders answered, among other things, to the complaint in said suit, that they severally deny that
10 they are, under the constitution and laws of the State of Minnesota, liable to contribute to the payment of said judgment a sum equal to the par value of the shares of stock held by them individually, or any other sum, amount or proportion. That the Minneapolis & St. Louis Railway Company was incorporated prior to the adoption or enactment of the constitutional provisions and statutes referred to. That the liability of the stockholders of said Minneapolis & St. Louis Railway Company was fixed by said act of incorporation and not otherwise; and that the constitutional provisions and laws referred to in the complaint are not applicable to or binding upon them.

11 It was urged upon the trial of said cause, both in the

District and Supreme Courts of the State of Minnesota, that Section 3, Article 10, of the State Constitution, imposing upon stockholders a personal liability for corporate debts, is in violation of Section 10, Article 1, Constitution of the United States, in that the provision of said Section 3, Article 10, impairs the obligation of the charter contract contained in Chapter 66, Special Laws of 1853, Territory of Minnesota, and amendatory acts.

It was also urged that Section 3, Article 10, if the State Constitution violates the Fourteenth Amendment to the Constitution of the United States, in that the State of Min-
12 nesota, by and through the provisions of said Section 3, Article 10, of the State Constitution, assumes to impair and destroy rights previously vested in said defendants by the charter of said railway company.

The Supreme Court of the State of Minnesota, by its final judgment in this action, rendered on the 26th day of August, A. D. 1898, decided, adjudged and determined as follows:

"The Minneapolis & St. Louis Railway Company is not the same corporation that was created by the Territorial act of 1853, entitled 'An act to incorporate the Minnesota Western Railroad Company,' but a new corporation created and organized under Special Laws of
13 1881, Chapter 113, and hence the stockholders were subject to the personal liability imposed by the Constitution, Section 3, Article 10.

"Having accepted the benefits of the act of 1881 by organizing, issuing stock and doing business as a corporation under it, the stockholders are estopped from asserting the unconstitutionality of the act."

In other words, the Supreme Court of Minnesota held that, by the consolidation of the railroad companies hereinbefore enumerated, a new corporation was created. That, notwithstanding the act of 1881, under which said consolidation was had, and the General Law of the State, expressed, and in terms preserved, continued and perpetuated all fran-
14 chises, privileges, exemptions and immunities originally vested in the original corporation created by act of the Territorial Legislature in 1853; the immunity or exemption of its stockholders from personal liability for corporate debts thus guaranteed and preserved, was taken away *by the constitutional provision adopted in 1857.*

ASSIGNMENT OF ERRORS.

The plaintiffs in error respectfully submit that the Supreme Court of Minnesota erred in this:

I.

The Court erred in holding that Section 3 of Article 10 of the Constitution of the State of Minnesota, which provides that "each stockholder in any corporation (except those organized for the purpose of carrying on any kind of mechanical or manufacturing business) shall be liable to the amount of stock held or owned by him," is valid, and imposes a personal liability for corporate debts upon the individual plaintiffs in error as stockholders of the corporation plaintiff in error, and that such constitutional provision does not impair the obligation of the contract between the State of Minnesota and the plaintiffs in error embodied in and evidenced by the special act of the Legislative Assembly of the Territory of Minnesota, approved March 3d, 1853, entitled "An act to incorporate the Minnesota Western Railroad Company," the benefits of which act were vested, continued and perpetuated in the plaintiffs in error by the special act of the Legislature of the State of Minnesota, approved March 2d, 1881, entitled "An act to amend an act entitled an act to amend an act entitled 'An act to incorporate the Minnesota Western Railroad Company,' approved March 3d, 1853, and the acts amendatory thereof, approved February 4th, 1870," and is not in conflict with the provisions of Section 10, Article 1, of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts.

II.

The Court erred in holding that Section 3 of Article 10 of the Constitution of the State of Minnesota is not violative of the Fourteenth Amendment to the Constitution of the United States, in that the State of Minnesota, by the provisions of said Section 3, assumes to impair and destroy rights vested in the plaintiffs in error by the special act of the Legislative Assembly of the Territory of Minnesota, approved March 3d, 1853, entitled "An act to incorporate the Minnesota Western Railroad Company," and by the special act of the Legislature of the State of Minnesota, approved March 2d, 1881, entitled "An act to amend an act entitled an act to

amend an act entitled 'An act to incorporate the Minne-
18 sota Western Railroad Company,' approved March 3d,
1853, and the act amendatory thereof, approved Febru-
ary 4th, 1870."

III.

The Court erred in holding that the enforcement against the plaintiffs in error of the provisions of Section 3, Article 10, of the Constitution of the State of Minnesota, which declares that each stockholder in any corporation shall be liable to the amount of stock held or owned by him, is not in violation of Section 10, Article 1, of the Constitution of the United States, in that it impairs the obligation of the contract between the State and the plaintiffs in error, which is embodied in and evidenced by the act of the Legisla-
19 ture of the State of Minnesota, approved March 2d, 1881,
the same being and constituting Chapter 113 of the Special Laws of Minnesota, enacted in the year 1881.

IV.

The Court erred in holding that the contract of consolidation between the Minneapolis & St. Louis Railway Company, the Minnesota and Iowa Southern Railroad Company, the Minneapolis & Duluth Railroad Company and Fort Dodge & Fort Ridgely Railroad Company, pursuant to Chapter 113 of the Special Laws of 1881, approved March 2d, 1881, created a new corporation.

PROPOSITIONS ASSERTED BY PLAINTIFFS IN ERROR.

20 The defendant in error moves for a dismissal of the writ and an affirmance of the judgment of the State court, on the ground that the record does not present a Federal question.

We preface the argument of this motion by a statement of the following propositions:

1. Prior to the adoption of the State Constitution, stockholders in the original corporation created by the Territorial act of March 3d, 1853, were exempt from personal liability for corporate indebtedness.

2. Prior to consolidation under the act of March 2d, 1881, the stockholders in each of the constituent companies
21 were exempt from personal liability for corporate indebtedness.

3. It is immaterial whether the present company is the original Minneapolis & St. Louis Railway Company, chartered in March, 1853, and in which the other constituent companies are merged by the consolidation agreement, or a new corporation created by such agreement.

If it is identical with the original company its stockholders are exempt, because its charter contract is older than the constitution which assumes to impose the liability.

If it is a new corporation created by the consolidation agreement pursuant to the act of March 2d, 1881, the
22 stockholders are exempt from personal liability, for the following reasons:

(a) It is the settled law of Minnesota, declared by its highest court, that its Legislature may transmit *existing* franchises, immunities and exemptions already vested in one corporation, to a *new corporation*, and this may be done notwithstanding the Legislature might be powerless to grant *new* franchises of the same class to such corporations at the date of such transmission.

(b) The Legislature of Minnesota has exercised this power and specifically vested in the consolidated company, *first*, all the franchises, privileges and immunities of each of the constituent companies; and *second*, the particular
23 franchises, privileges, exemptions and immunities

granted to the Minnesota Western Railroad Company by the Territorial Legislative Assembly of 1853.

(c) By the General Laws of the State, in force at the time of the consolidation, all the franchises, privileges, immunities and exemptions of each constituent company vested in the new corporation without impairment, change or diminution.

4. By the acceptance of the special act of 1881, and the execution of the consolidation agreement pursuant to its provisions, that act became a contract, binding alike upon the corporation and the State.

5. As the Legislature, by the act of March 2d, 1881, and by the General Statutes, specifically continues to and
24 perpetuates in the present company all the franchises, privileges, exemptions and immunities of each constituent company,—and as the stockholders of each were, at the time of consolidation, exempt from personal liability for corporate indebtedness,—and as the act constitutes a valid contract between the plaintiffs in error and the State, it follows that the contract is violated and its obligations impaired by the enforcement of the constitutional liability.

6. If the special act of March 3d, 1881, created a new corporation in violation of Section 2, Article 10 of the State Constitution, and is void, the stockholders are exempt from personal liability under the charters of the constituent
25 companies. They are not estopped to assert the unconstitutionality of the act.

7. As the special act of the Legislature, pursuant to which the consolidation agreement was entered into, was not construed by the State court before the consolidation agreement was made, this court is not bound by the construction of the State court, but will construe the act and the contract made in pursuance thereof independently.

Does the Record Present a Federal Question?

I.

The charter of the Minneapolis & St. Louis Railway Company was granted by the Legislative Assembly of the Territory of Minnesota by special act, approved March 3d,
26 1853, the corporate name then being the "Minnesota Western Railroad Company." This act, which constituted the original contract between the Territory on the one side and the corporation and its stockholders on the other side, is set forth in full on pages 41 to 46 of this brief.

Neither the charter nor the general law of the Territory imposed upon stockholders in the corporation thus created, personal liability for corporate debts.

The statutes being silent, no personal liability existed. When a State or Territory grants to individuals the right to exercise corporate powers, such individuals and the corporation thus created, by accepting the grant, become in-
27 vested with every right, privilege, franchise, exemption and immunity granted in terms, or existing by necessary implication under general or special laws.

In *Cook on Stock and Stockholders, Secs. 212, 213,* the law is stated as follows:

"Probably the most characteristic feature of a corporate existence is the fact that, by being a corporation, its stockholders are liable only for the par value of the stock held by them, and when that is once paid in money or property, there is no further liability. *This exemption from liability need not be declared in the charter,*
28 *but arises from the very fact of incorporation.*

"For this reason, legislatures are very careful in giving joint stock companies special powers, to distinctly declare that the company shall not thereby become a corporation. *The very fact of incorporation, by itself releases subscribers for stock from all liability for corporate debts, except to the extent of their unpaid subscriptions.*

"It has been deemed wise, however, by the State Legislatures in many instances to increase the liability of stockholders to corporate creditors; accordingly, statutes are passed expressly declaring that the stockholders shall be liable for a specified sum in addition
29 to their unpaid subscriptions; this is called the statutory liability of stockholders. It rarely exists as regards stockholders in railroad corporations, but frequently exists in the case of manufacturing and various other corporations, and nearly always exists as against the stockholders in banks.

"This additional liability may be imposed by the State Constitution or by the charter, or by a general statute. Where this liability is imposed by a provision existing at the time of the creation of a corporation, there is no doubt of its constitutionality, but where the liability is created by a statute or constitutional provision enacted
30 after the corporation was incorporated, then there arise difficult questions of constitutional validity."

In *United States vs. Estate of Leland Stanford, 161 U. S. 429*, Mr. JUSTICE HARLAN says:

"As the stockholder of a corporation is not liable beyond the amount of his unpaid subscription, for its debts, unless such liability is imposed by statute, and as the acts of Congress are silent upon that subject, every subscriber to the stock of the Union Pacific Railroad Company must be deemed to have become such *upon the condition, implied by law, that he should not be personally liable for the debts of the corporation.*"

The law, as it existed at the time the charter was granted, entered into and became a part of the charter contract,
31 and the rights of the interested parties are to be determined by the laws in force at the time the charter was granted.

Hillebert vs. Porter, 28 Minn., 497.
Bronson vs. Kinzie, 1 Howard, 311-314 (14 Curtis, 631-2).

In *Von Hoffman vs. City of Quincy, 4 Wallace, 550*, it is said:

"It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge and enforcement."

32 In *Walker vs. Whitehead, 16 Wallace, 317, 318*, Mr. JUSTICE SWAYNE said:

"The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction and enforcement;

Nothing is more material to the obligation of a contract than the means of its enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the constitution against impairment;

The obligation of a contract 'is the law which binds the parties to perform that agreement.' Any impairment of the obligation of
33 a contract—the degree of impairment is immaterial—is within the prohbition of the constitution;

The States may change the remedy, *provided no substantial rights securedby the contract is impaired.* Whenever such a result is produced by the act in question, to that extent it is void. The States are no more permitted to impair the efficacy of a contract in this way than to attack its vitality in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the constitution. It must be left with the same force and effect, including the substantial means of en-
34 forcement, which existed when it was made; the guarantee of the constitution gives it protection to that extent."

This Court said, in *McCracken vs. Hayward, 2 Howard, 608 (15 Curtis, 231)*:

"The obligation of a contract consists in its binding force on the

party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other."

See also *Barnitz vs. Beverley, 163 U. S., 127*, which holds that all the laws of the State existing when the contract is made, which affect the rights of the parties to the con-
35 tract, enter into and become a part of it, and are obligatory on all courts which assume to give a remedy on such contracts.

The contract thus implied is protected by the Federal Constitution as fully as if affirmatively expressed in the charter.

Fisk vs. Jefferson Police Jury, 116 U. S., 134.

These authorities dispose of the technical objection that the immunity was not affirmatively *granted*, suggested by defendant in error.

The Supreme Court of Minnesota, in *Robertson vs. Sibley, 10 Minn., 323 (Gil. 253-256)*, said that personal liability of stockholders for corporate debts did not exist prior
36 to the adoption of the State Constitution. The ruling was not, however, necessary to the decision of the case. *Such immunity is a franchise.*

Given vs. Wright, 117 U. S., 656.
Stevens vs. Railway Co., 36 Minn., 471.

And is personal to the stockholders.

A charter provision exempting a corporation from taxes exempts stockholders from assessment of their stock for taxation; and a subsequent provision of a State Constitution providing for taxation of shares of stock is, *as to the stockholders*, in violation of the Federal Constitution, because it impairs the obligation of the charter contract.

37 *Gordon vs. Appeal Tax Court, 3 How., U. S. 133.*
United States vs. Estate of Leland Stanford, 161 U. S., 429.
Dodge vs. Woolsey, 18 Howard, 331, 359.

Clearly the grant of corporate powers and corporate rights carried to the stockholders the attendant immunity from personal liability under existing laws; and, in the further discussion of this motion, it will be assumed by the plaintiffs in error that, under the charter of 1853, stockholders in the corporation thereby created were exempt from personal liability for corporate debts. This proposition is neither controverted nor questioned by the State court.

38 II.

Prior to the consolidation, which became effective June 1st, 1881 (page 28, folio 53, Record), pursuant to the provisions of Chapter 113, Special Laws of 1881, approved March 2d, the stockholders of each and all of the constituent companies were exempt from personal liability for corporate indebtedness.

This exemption of the stockholders of the original Minneapolis & St. Louis Railway Company resulted from the fact that its charter was older than the constitutional provision which assumes to impose the liability.

The Minneapolis & Duluth Railroad Company was an
39 organization of holders of special stock of the Minneapolis & St. Louis Railway Company, pursuant to Section 5 of Chapter 57 of the Special Laws of Minnesota for the year 1870, said act being an amendment to the original charter act of March 3d, 1853. (Page 47 of this brief.)

The agreement under which it was created is found in the printed record at page 65, being "Exhibit 1." Its organization is under the charter of the Minneapolis & St. Louis Railway Company, of which it formed a part.

The Fort Dodge & Fort Ridgely Railroad Company and the Minnesota & Iowa Southern Railroad Company were Iowa corporations. At the date of their creation the laws of
40 that State authorized the incorporators of railroad companies to exempt the stockholders from personal liability for corporate debts, by embodying in the articles of incorporation an article or provision declaring such exemption.

See Additional Stipulation of Facts, page 64, Record.
See also Iowa, Code of, 1873, Sec. 1062, sub-div. 7, page 184.

The charter of each of said companies contained an article or section declaring the exemption.

See Articles of Incorporation of the Minnesota & Iowa Southern Railroad Company, page 73 of Record, Art. 9.
Articles of Incorporation of the Fort Dodge & Fort
41 *Ridgely Railroad Company, page 75 of Record, Art. 7.*

It is clear that the stockholders of each of the several companies entering into the consolidation agreement were exempt from personal liability for corporate debts.

III.

The Legislature of the State of Minnesota had power, under the State law, to transmit the franchises, privileges and immunities of the original corporation to a new corporation.

If the consolidation agreement did not create a new corporation, the franchises, exemptions, privileges and immunities of each constituent company were continued; the only limitation being that, unless it be clear that the Legis-
42 lature intended to extend such franchises, exemptions, privileges or immunities of each and all the constituent companies to the consolidated company, they will be limited to the company to which they were granted, and the property of each corporation and the stockholders in each corporation must be answerable according to the law under which such corporation was created.

Central R. R. Co. vs. Georgia, 92 U. S., 665.

As the stockholders of all the constituent companies were exempt from personal liability, the exemption would, under this rule, extend to all the stockholders of the consolidated company.

43 *If a new corporation was created by the consolidation, as was held by the Supreme Court of Minnesota, the franchises of the constituent corporations either passed to the new corporation or vested in the State, which could lawfully confer them upon the new corporation.*

This rule is asserted by the highest court of Minnesota in

First Division of the St. Paul & Pacific R. R. Co. vs. Frank M. Parcher et al., 14 Minn., 297 (Gil. Ed. 224).

The Supreme Court of the State held in that case that a transfer of existing franchises is not in violation of that section of the constitution which provides that no corpora-
44 tion shall be formed under special acts except for municipal purposes.

I quote from the opinion of the Court on pages 234-235:

"But it is urged that the act transcends the power of the Legislature, because it attempts to form a corporation by a special act, in violation of Section 2, Article 10, of our Constitution.

Whatever may be the meaning of the constitutional inhibition referred to, we are of the opinion that it does not forbid such legislation as was had in this instance. There was no attempt here to create *a new corporate franchise*, and thus to form and bring into existence for the first time, that which is the very essence of a corporation,
45 and without which a corporation is nothing; but corporate franchises *already in existence*, and held by the State as property,

without merger, in its general sovereignty, and without extinguishment, were *transferred* to the persons enumerated in the act. *This, we think, was a legitimate and constitutional transaction.*"

The Supreme Court of Minnesota has gone to the extreme in asserting the right of a Legislature to transmit and enlarge franchises granted by special act, without violation of the constitutional provision.

In *Green vs. Knife River Falls Boom Co., 35 Minn., 155*, it was definitely settled that in Minnesota, a charter of a corporation, whether organized under a general statute or
46 by special charter, may be amended to the extent of conferring on it new and enlarged powers not granted by the original charter, even if the effect of the amendment provides to change the charter, the business and the object of the corporation; and that such amendment is not a violation of the constitution.

See also *Ames vs. Railroad Co., 21 Minn., 241.* The opinion upon rehearing, by which the former decision was overruled, commences on page 281.

City of St. Paul vs. St. Paul & Sioux City R. R. Co., 23 Minn., 469.

In *Huff vs. Winona & St. Peter R. R. Co., 11 Minn., 180 (Gil. 114)*, it is held that franchises granted to one corporation by special act may be transmitted by act of the
47 Legislature to a *new corporation*, and that the transfer is valid. The Court says (p. 124) of corporations:

"This artificial being may be dissolved or may in some other way forfeit its franchises, and the State, under such circumstances, may permit them to merge, and thus become extinguished, or may revive the old corporation and again confer upon it the same franchises, *or it may grant them to a different corporation.*"

The State may continue the immunities of the original corporation to a new one, by reference to the original act.

Railroad Company vs. Maine, 96 United States, 499, 510.
The Binghampton Bank, 3 Wallace, 51.

It is, and was at the time the consolidation agreement was made and became effective, *the statute law* of
48 Minnesota that the rights, franchises and immunities of existing railroad corporations might, *by consolidation*, be vested in a *new corporation.*

Chapter 94 of the General Laws of Minnesota for 1881, approved March 3d, 1881 (printed in full on page 19 of this brief), provides for a consolidation of railroad corporations, either domestic or foreign, whether organized under the general law or special charter. After reciting the steps neces-

sary to complete a consolidation, Section 2 of the act declares that "the said corporations shall become merged in the *new corporation* provided for in said articles," and that the "new corporation" shall "succeed to all the rights, powers,
49 franchises, contracts, privileges, immunities, liabilities, obligations and duties, liabilities to or exemption from taxation, commutations, property, real, personal or mixed, and things in action, as fully in all respects as the same were possessed by such old corporation or corporations at the time of such consolidation, under the laws of this State; and such *new corporation* shall hold and enjoy the same, and all and every part thereof, without impairment or change, *as fully and in the some manner and to the same extent as if the said consolidation had not taken place.*"

This general act affirms and determines the *power* of the State to transfer existing franchises to a new corpora-
50 tion. This power was exercised in favor of the plaintiffs in error, by the special act passed at the same session vesting in and continuing to it the immunity of the constituent corporations.

Argument of the question whether the consolidation created a "new corporation" is largely a play upon words. Existing franchises may be conferred upon a new corporation, and their existence continued, as fully as if they were still vested in the corporation to which they were first granted. This proposition is asserted, and affirmed by statutory enact-
ment in Minnesota, and by the decision of the highest
51 court of the State. There is no question of *power;* the question is purely one of *intent.* If it was the intent and purpose of the State Legislature to confer, transmit or continue the franchises and immunities created by the charter act of 1853 to the present consolidated corporation, it is entirely unimportant whether such consolidated corporation is "a new corporation" or a consolidation of old ones. The holding that it is "a new corporation" decides nothing material to the issue in this case. If the franchises which give life to this corporation were created by the act of 1881, the con-
52 stitutional liability applies; if created in 1853, it does not apply. The question in this case is this:

Did the Special Act of March 2d, 1881 create or assume to create NEW FRANCHISES?

IV.

The Legislature of Minnesota did transfer, transmit and continue to the new corporation created by the consolidation, all the franchises, privileges, immunities and exemptions of each constituent company. It did this both by general and special legislation.

By the terms of the consolidation agreement entered into by the several railroad companies, each company *granted, bargained, sold, transferred* and *set over* to the
53 new corporation all the rights, franchises, privileges and immunities of each constituent corporation.

See paragraphs 3 and 4 of Consolidation Agreement, page 29, Printed Record.

Section 69, Chapter 34, of the Minnesota General Statutes of 1878 provides, among other things, that

"Any railroad corporation may lease *or purchase* any part or all of any railroad constructed by any other corporation whose lines of road are continuous or connected with its own, upon such terms and conditions as may be agreed upon."

Chapter 94, General Laws of Minnesota, 1881, ap-
54 proved March 3d of that year, provides that

"Any railroad corporation, either domestic or foreign, whether organized under a general law or by virtue of a special charter, may *lease or purchase, or in any way become owner of, or control the stock of* any other railroad corporation, when their railroads can be lawfully connected and operated together so as to form one continuous main line, with or without branches."

This law was in force at the time the consolidation agreement became effective, June 1st, 1881.

The whole of said act (Chapter 94, Gen. Laws of 1881) will be found on page 19 of this brief.

The lines of the constituent corporations form a continuous main line.

55 The Minneapolis & Duluth Railroad (which was, when constructed, a part of the Minneapolis & St. Louis Railroad, as hereinbefore explained) extended from White Bear Lake to the City of Minneapolis, where it connected with the main line of the last named railroad company.

(See Exhibit A, page 25, Printed Record, folio 48.)

The line of the Minneapolis & St. Louis Railway extended from Minneapolis to the Iowa State line, where it connected with the railroad of the Minnesota & Iowa Southern Railroad Company. (See Exhibit A, page 25, Printed Record, folio 47.)

The railroad of the Minnesota & Iowa Southern Railroad Company extended from the Iowa State line to Liver-
56 more, Iowa, where it connected with the railroad of the Fort Dodge & Fort Ridgely Railroad Company. (See Exhibit A, page 26, Printed Record, folio 49.)

The sale of the property, stock and franchises of each

constituent company to the new corporation was fully authorized by the State law.

There is a conflict of authority as to whether an immunity passes by sale or consolidation, but, in Minnesota, the question is settled in the affirmative.

It was held by the Supreme Court of Minnesota, in *First Division, etc., R. R. Co. vs. Parcher, 14 Minn., 297* (page 224, Gilfillan Edition), that an exemption or immunity is a *contract right* and passes by a sale of the corporate property.

57 In that case the question was whether the purchaser of a railroad at foreclosure sale took, by the sale, an immunity from taxation, which constituted one of the corporate franchises.

On pages 252-3 (Gilfillan Edition) the Court says:

"It is further contended that this immunity from taxation was conferred upon the Minnesota & Pacific Railroad Company personally (so to speak), and for its benefit only, and that it did not pass to the State by the foreclosure and forfeiture. It may admit of some doubt whether the rights conferred upon the company in respect to taxation are not franchises in the authorized sense of the term.

If these rights are franchises, there is no reason apparent why the State did not acquire them with the other franchises of the com-
58 pany, by virtue of the foreclosure and forfeiture. And even admitting that this immunity or privilege was originally personal to the Minnesota & Pacific Railroad Company, under the provisions of its charter, it was by virtue of the amendment to the constitution, and not by an act of ordinary legislation, permitted to be made the subject of mortgage, and therefore transferrable to the purchaser at mortgage sale.

We are, however, of opinion that this privilege or immunity in reference to taxation is in no greater degree personal to the Minnesota & Pacific Railroad Company than any other of its rights or franchises.

59 All the franchises and rights conferred upon the company were granted for the benefit of the company, and in that sense were all personal. But we perceive nothing in the language employed in reference to this right, privilege or immunity to distinguish it, in this respect, from the other rights granted. It would certainly be one of 'the privileges, grants, franchises, immunities and advantages,' the sale and transfer of which is authorized by the provisions of Section 21 of the original charter of the company.

But if this immunity from taxation be not a franchise, in the legitimate meaning of the word, it certainly was, as we have already
60 determined, a right and a contract right, to hold the lands exempt from taxation until the same were sold and conveyed. And as it was not a personal and inalienable right, there is no reason why it would not pass with the lands, and as appendant thereto, to the State. When the Minnesota & Pacific Railroad Company lost the lands it lost this right, for it had lost that to which this right related. The question then is, what became of the right? The State took and held what it acquired, not in its sovereign character, but as property, like a private individual; and in this capacity it succeeded to the roads, lands and franchises of the company, and in our opinion to this
61 immunity from taxation as appendant to the lands. If this was not the case, then this immunity was merged or extinguished. That it was not the intention or interest of the State to suffer it to be merged or extinguished, but to hold and transfer it for the purpose of

facilitating and hastening the construction of the road, is, we think, apparent, for the reasons which we have before advanced, for the purpose of showing that the State took, held and transferred the corporate and other franchises of the company, unmerged and unextinguished."

Whatever may be the law in other jurisdictions, such is the settled law of Minnesota.

62 V.

It has been the law of Minnesota ever since the State was admitted into the Union that railroad companies might consolidate without loss of corporate rights or privileges.

Minnesota was admitted on May 11th, 1858. Ninety-one days thereafter, to-wit, on August 12th of the same year, Chapter 70 of the General Laws of 1858 was approved. Subdivision 1 of Section 21 of that act reads as follows:

"Any two or more railroad corporations may, by their directors, enter into an agreement, under the corporate seal of each, for the consolidation of the said two or more corporations, prescribing
63 the terms and conditions thereof; the mode of carrying the same into effect; the name of the new corporation; the names and places of residence and number of the directors thereof, which shall not exceed fifteen; the time and place of holding the first election of directors; the number of shares of capital stock in the new corporation; the amount of each share, which shall not be less than one hundred dollars; the manner of converting the shares of capital stock in each of said two or more corporations into shares of capital stock of the new corporation; the manner of compensating stockholders in each of said two or more corporations, who refuse to con-
64 vert their stock into the stock of such new corporation; with such other details as they shall deem necessary to perfect such consolidation of said corporations: *and such new corporation shall possess all the powers, rights and franchises conferred upon such said two or more corporations*, and shall be subject to all the restrictions and perform all the duties imposed by the provisions of this act; Provided, that all stockholders in either of such corporations who shall refuse to convert their stock into the stock of such new corporation, shall be paid at least par value for each of the shares so held by them, if they shall so require, previous to said consolidation be-
65 ing consummated."

These provisions were continued, with little change in language, and none in effect, in Section 36 of Chapter 34 of the revision of 1866, page 269, and in Section 36, Chapter 34, of General Statntes of 1878.

On March 3d, 1881, and prior to the execution of the consolidation agreement, *Chapter 94 of the General Laws of Minnesota for 1881*, was duly approved and became a law. This chapter is as follows:

'CHAPTER 94.

An Act to authorize any railroad company to lease, purchase, or in any way become owner of, or to control, any other railroad corporation, or to consolidate therewith.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. Any railroad company, either domestic or foreign, whether organized under a general law or by virtue of a special charter, *may lease or purchase, or in any way become owner of or control, or hold the stock of, any other railroad corporation, when their respective railroads can be lawfully connected and operated together, so as to constitute one continuous main line, with or without branches.*

SEC. 2. Any railroad corporation, whether organized under a general law or by virtue of a special charter of the State or Territory of Minnesota, or under the laws of any other State or States or Ter-
67 ritory, whose lines of railroad now or hereafter constructed within or without this State, can be lawfully connected and operated together to constitute one continuous main line, with or without branches, so as to admit of the passage of trains over them without break or interruption, *may consolidate their stock and franchises upon such terms as may be agreed upon, so as to become one corporation by any name by them selected.*

Articles stating the terms of consolidation shall be approved by each corporation by a vote of the stockholders owning a majority of the stock, in person or by proxy, at either a regular annual meet-
68 ing thereof or at a special meeting called for that purpose, by a notice of at least thirty (30) days, stating the object of such meeting, to be addressed to each of such stockholders, when their place of residence is known, and deposited in the postoffice, and published for at least three (3) successive weeks in one newspaper in at least one of the cities or towns in which each of said corporations has its principal business office, or by the consent in writing of a majority of such stockholders annexed to such articles: a copy of such articles of consolidation and of the record of such approval, or of such consent, accompanied by lists of the stockholders of said corporation, and
69 the number of shares held by each, duly certified by their respective presidents and secretaries, with the respective corporate seals thereto affixed of said corporations, shall be filed for record in the office of the Secretary of State of this State, and of the State or States or Territory by or under whose laws the said corporations, parties to such articles of consolidation, were created or exist, before any such consolidation shall have any validity or effect. Upon the filing for record of said copies the said corporations shall beceme merged in the new corporation provided for in said articles, to be known thereafter by the corporate name therein adopted, *and shall, within*
70 *this State, succeed to all the rights, powers, franchises, contracts, privileges, immunities, liabilities, obligations and duties, liabilities to or exemption from taxation, commutations, property, real, personal and mixed, possessed by such old corporation or corporations, at the time of such consolidation under the laws of this State; and such new corporation shall hold and enjoy the same, and all and every part thereof, without impairment or change, as fully in the same manner and to the same extent as if the said consolidation had not taken place.* Provided, that all rights of creditors, and all the liens upon the property of either
71 of said old corporations, shall be preserved unimpaired, and all the debts, liabilities and duties of either of said consolidated corporations shall thenceforth attach to said new corporation, and be enforceable to the same extent, and in the same manner, as if such debts, liabilities and duties had been originally incurred by it. Provided further, that all such corporations shall be subject to the laws of this State and the jurisdiction of the courts of this State, in the same manner and to the same extent as domestic corporations.

SEC. 3 No railroad corporation shall consolidate with, lease or purchase, or in any way become owner of, or control any other
72 railroad corporation, or any stock, franchises, rights of property thereof, which owns or controls a parallel or competing line.
SEC. 4. This act shall take effect and be in force from and after its passage.
Approved March 3, 1881."

The language which continues the immunities and exemptions "to the same extent as if said consolidation had not taken place," could not be made stronger, nor could the policy and purpose of the law be more clearly expressed. It applies in terms equally to corporations created by general laws or special act.

It is clear, therefore, that the Legislature did transfer and transmit all the franchises, exemptions, privileges and immunities of each constituent company to the new corpo-
73 ration by general law.

It also did so by special law.

The special act of March 3, 1881, which authorizes the consolidation, contains the following sections:

"SECTION 12. Upon the consummation of said act of consolidation as aforesaid, all and singular the rights, privileges, exemptions and franchises of each of said corporations, parties to the same, and all the property, real, personal and mixed, and all debts due on whatever account to either of said corporations, as well as all stock, subscriptions and other things in action belonging to either of said corporations, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and all claims, de-
74 mands, property, rights of way, and every other interest, shall be as effectually the property of the new corporation as they were of the former corporations, parties to the said agreement and act; and the title to all real estate, taken by deed or otherwise, under the laws of this State, vested in either of such corporations, parties to said agreement and act shall not be deemed to revert or be in any way impaired by reason of this act, or anything done by virtue thereof, but shall be vested in the new corporation by virtue of such act of consolidation.

"SECTION 14. All the provisions of the General Laws of this State in regard to *railroad* corporations shall be applicable to any new
75 corporation formed by consolidation under the provisions of this act, except so far as the same shall not be applicable thereto by reason of the situation of portions of its line within this State; *provided, that nevertheless, the privileges, franchises, exemptions and immunities hitherto granted to the Minneapolis & St. Louis Railway Company shall continue to and be vested in such new corporation, with the same effect as if originally granted thereto;* and that such new corporation may at any time hereafter be consolidated with any other railroad company or companies, in the same manner and
76 with the same effect as is by this act provided."

The provisions of Section 11 of the act quoted by counsel, providing that the new *corporation* "shall be subject to the *restrictions* and duties imposed by the laws of the State," has no connection with or reference to the liability of stockholders. The constitutional provision does not impose a "restriction" or a "corporate duty."

The provisions of the general laws made applicable to the consolidated corporation are limited to those applicable to *railroad* corporations, as distinguished from corporations generally.

There are no less than three conclusive reasons why it should be held that the immunity from personal liability for corporate debts guaranteed to the stockholders of each and all of the constituent corporations by their several charters, is continued to, and vested in the stockholders of the con-
77 solidated corporation:

First: The Special Act of March 2, 1881, authorizing the consolidation, and pursuant to which the consolidation was made, specifically continues to and vests in the consolidated corporation and its stockholders all "*the rights, privileges, exemptions and franchises of each of said corporations*" (Sec. 12), and all the "*privileges, franchises, exemptions and immunities*" of the Minnesota Western Railroad Company, chartered in 1853 (Sec. 14).

Second: By Section 4 of the Consolidation Agreement the several constituent companies, in accordance with the law of the State, as set forth in Section 1 of Chapter 94 of
78 the General Laws of 1881, approved March 3, 1881, sold and conveyed all their "respective railways, properties and estates, real, personal and mixed, and their respective franchises, rights, easements, privileges, immunities and exemptions" to the consolidated company; and under the decisions of the Supreme Court of Minnesota such sale carried with it the immunity or franchise of personal exemption from liability for corporate debts.

Third: By the consolidation agreement, the corporation plaintiff in error, by virtue of the general laws of the State embodied in Chapter 94. General Laws of 1881, succeeded to "all the rights, powers, franchises, contracts, privileges
79 and immunities" of each constituent corporation, "*and all and every part thereof, without impairment or change, as fully, in the same manner and to the same extent, as if the said consolidation had not taken place,*" including the stockholders' immunity from personal liability. The purpose of the Legislature to preserve to this company all the benefits, of the general law is expressed in Section Fourteen of the Special Act, which makes all general laws "in regard to *railroad* corporations" applicable thereto; and at the same time, in order to guard against a possible lapse or loss of original charter rights, a proviso was added, declaring "nevertheless, the privileges, franchises, exemptions and immunities hitherto granted to the Minneapolis & St. Louis Railway Company shall continue to and be vested in

such new corporation, with the same effect as if originally granted thereto."

The general act of 1881 provided that corporations formed by consolidation under the provisions of that act "shall be subject to the laws of this State and the jurisdiction of the courts of this State, in the same manner and to the same extent as domestic corporations." It is doubtful whether this provision was intended to serve any other purpose than to extend generally the jurisdiction of the laws and courts of the State over such foreign corporations as should enter into the consolidation agreement. The fact that the language might be so construed as to affect existing franchises and immunities, furnishes the only reason for the enactment of the Special Act of 1881 authorizing the consolidation agreement in the case at bar. It is evident that the sole purpose of Section 14 of the Special Act was to construe the general law and to clearly and unequivocally express the intent of the Legislature to preserve the privileges, franchises, exemptions and immunities created and granted by the act of 1853 from impairment by any construction of the general statutes; otherwise this consolidation might have been made with equal advantage under the provisions of the general act.

VI.

The State of Minnesota is bound by the contract embodied in the act of March 3d, 1853, as amended by Chapter 113, Special Laws of 1881, approved March 2d, 1881, and it is for this Court to construe the contract, without regard to the decision of the State court.

The most favorable construction of this act which can be asked by the State, is that it be construed as the charter of the new corporation. Its title declares it to be an amendment to the charter of the Minnesota Western Railroad Company, which is identical with the original Minneapolis & St. Louis Railway Company; the change of name being authorized by Section 5 of Chapter 57 of the Special Laws of 1870.

Whether the act be construed as a new charter or an amendment to an existing charter, it is none the less a contract.

It is for this Court to construe this contract.

This is not a case where the construction of a State statute by a State court is binding upon this Court. That rule applies only to general statutes applicable to all citizens; to statutes which vest no absolute right, but vest only such rights as are subject to modification or rescission

at the will of the Legislature. In such cases the doings between the citizens and the Legislature are in the nature of legislation rather than compact, and may be modified or abolished. A charter granted by special act to a particular person or collection of individuals is a compact; a contract, to which the State is a party.

Where a suit involves rights under a contract affected by a State statute, and entered into before such statute has been construed by the State courts, a Federal court is not bound by a subsequent construction by the State courts, but will exercise an independent judgment.

Burgess vs. Seligman, 107 U. S., 33-34.
85 *Carroll County vs. Smith, 111 U. S., 562-3.*
Anderson vs. Santa Anna, 116 U. S., 362.
Pleasant Township vs. Ætna Life Ins. Co., 138 U. S., 72-73.

The consolidation agreement was entered into by the several railroad corporations under date of April 20, 1881, and became effective on June 1st of the same year. The Special Act of March 2d, 1881, under which the agreement was made, had not then been construed by any court, and is for the first time presented for construction in the case at bar.

The Circuit Court of the United States for Indiana held, in the case of *Central Trust Company of New York vs. Citizens Street Railway Co. of Indianapolis, et al., 82 Fed. Rep., 1,* that where the controversy concerns a contract, and the meaning of the contract depends upon the construction of a State statute, or a provision of a State constitution, a
86 decision on the meaning of said statute or constitutional provision by the highest court of a State, made after the contract was entered into and rights had vested thereunder, is not conclusive upon a litigant in a Federal court. The litigant in such case is entitled to the independent judgment of the National tribunal.

Whether there is a Federal question in this case depends largely upon the construction given the general and special acts of 1881.

In the case of *Louisville Trust Co. vs. City of Cincinnati, United States Circuit Court of Appeals, 76 Federal Reporter, 296, 301,* Lurton, Circuit Judge, states the rule as
87 follows:

"Where a contract or obligation has been entered upon before there has been any judicial construction of a State statute upon which the contract or obligation depends, by the highest court of the State, a Federal court obtaining jurisdiction of a question touching the validity, effect or obligation of such a contract will, while leaning to an agreement with the State court, exercise an independent judgment as to the validity and meaning of such contract, and will not necessarily

follow the opinion of the State court construing such statute, if such decisions were rendered after the rights involved in the contro-
88 versy originated."

It is for this court to determine, independently of the adjudications of the State court, *whether there exists a contract*, within the protection of the Federal constitution.

Jefferson Branch Bank vs. Skelley, 1 Black, 436.
Wright vs. Nagle, 101 United States, 793-4.
Railroad Company vs. Palmes, 109 United States, 256.

The argument of counsel for defendant in error in the third subdivision of his brief, touching this question of jurisdiction to construe the charter contract, is specious, but unconvincing. It is first argued that the finding of the
89 State court as to the effect of the consolidation under the amendment of March 2d, 1881, is a finding of *fact*, and therefore not reviewable here. The question is one of *law*, not of fact, and *Dover vs. Richards, 151 United States*, cited, is not applicable.

Counsel next cites *Lehigh Water Company vs. Easton, 121 United States, 388*, upon the proposition that the constitutional provision that "no State shall pass any law impairing the obligation of contracts," necessarily refers to the law made after the particular contract in suit. The rule asserted is conceded, but is not involved here. The contract which we assert was made in 1853, and is the original charter of
90 the Minneapolis & St. Louis Railway Company. This charter was amended in March, 1881. It is for this court to construe both the original act and the amendment. It may construe the original, because the direct question is whether the State constitution subsequently adopted impairs it. The amendment of 1881 is involved,—not because plaintiffs in error look to it as *granting* either corporate or individual franchises or immunities, but because it specifically *preserves* and continues those granted in 1853. Whether it has the effect claimed, depends upon its construction. This court should construe it independently, because the consoli-
91 dation agreement was entered into pursuant to its conditions and in reliance upon its clearly expressed terms, before it had been construed by the State court or any court.

Being an amendment to the original charter of 1853, it became, upon adoption, a part of such charter, and an additional guaranty of the franchises and immunities conferred by the Territorial act. The amendment assumes to make no change in the charter, but, on the contrary, assumes to guarantee a continuance of its immunities. *As construed by the State court, the Special Act of 1881 becomes a part of the procedure by which the State has violated the charter*

contract. It is one step in that direction taken by the
92 Legislature, the next and final step being taken by the court which construed the act and enforced it.

It is the *enforcement* of the constitutional liability against these plaintiffs in error which constitutes the grievance stated in the second and third assignments of error in this court. Whether enforced by the Legislature or the courts, or both, it is equally a violation of our contract right.

The construction placed upon the act of 1881 raises the question as to whether the Federal Constitution has been violated, for it is by such construction that we are deprived of the immunity guaranteed by the charter.
93 The right to amend the charter to take away its franchises did not exist when the act of 1881 was enacted; section Twenty-two of the act of 1853, which reserved the power of amendment being repealed by Section Six of Chapter 57, Special Laws of 1870.

At the time the several railroad companies entered into the consolidation agreement, they did so in good faith, and upon the assurance and condition embodied in both general and special acts, that all existing rights, privileges, franchises and immunities would be preserved. But for such conditions and assurance, the special act would not have been accepted. Each company was organized under a charter exempting stockholders from personal liability. The acts
94 of 1881 guaranteed the continuance of this immunity. It was a condition and an important consideration of the contract between the railroads and the State.

The defendant in error asserts the right of the State to violate its contract, and to act as the final judge as to its own right to do so. We deny both propositions. We assert the fundamental doctrine of Contract Law, that by accepting the act of 1881 and entering into the agreement of consolidation, the several companies did not accept disadvantages alone, but became entitled to the advantages. All of its provisions relating to consolidation must be taken together. If a new coporation was created, it was upon the terms and con-
95 ditions contained in the acts. It cannot be held that the companies, having accepted an act, can be deprived of its benefits.

In construing the special act it should be remembered that it neither creates nor confers new franchises. It continues old ones. It is only the franchises of the constituent companies which are conferred upon the consolidated company. This is the test. To hold that these several companies lost their respective franchises by consolidating them, in view of the care taken by the Legislature to preserve and continue them, is not consistent. Such is not the effect

96 of consolidation, even in the absence of saving legislation.

The law, as settled by this court, is that a State Legislature may continue and extend to a consolidated corporation all the rights, privileges and immunities of the constituent corporations, but that, unless it is clear that the Legislature intended to extend the exemption, privilege and immunities of each and every constituent company to the consolidated company, the exemption, privilege or immunity will be limited to the charter of the particular company to which the grant of such privilege, immunity or exemption was made, and that the property of each constituent company, and conse-
97 quently the stockholders in each constituent company, must be answerable according to the law under which each of the several corporations is created.

Central R. R. Co. vs. Georgia, 92 U. S., 665.

Tomlinson vs. Branch, 15 Wallace, 460, holds that where two railroad companies are consolidated, the presumption is that each of the two united lines of road will be respectively held with the privileges and burdens originally attaching thereto, unless the contrary is expressed. In the case at bar "the contrary" is not expressed; the existing immunities are carefully preserved, and the stockholders of each
98 constituent company were by law exempt from personal liability.

The question is thus reduced to one of legislative intent, which is clearly expressed in the statute under consideration in the case at bar.

It is held in *Chesapeake, etc., R. R. Co. vs. Virginia, 94 U. S., 726,* that, in case of consolidation, the consolidated company possesses the same immunities possessed by the constituent companies.

Green County vs. Conness, 109 U. S., 106, holds that "it is to be presumed that the franchises and privileges of each constituent road continue to exist in respect to the several roads as consolidated.

99 The question here presented is met by the opinion in the case of *County of Scotland vs. Thomas, 94 U. S., 682.*

In that case a railroad company was incorporated in 1857. At that time it was lawful for the county court of any county in which any part of the railroad was constructed, to subscribe to the stock of the company. By a provision of the State Constitution, adopted in 1865, the Legislature was forbidden to authorize such subscription, except upon certain conditions. Subsequent to the adoption of the constitution the Legislature authorized the consolidation of domestic

railroads with foreign railroads with whose lines the
100 railroad of the domestic corporation connected. Such
a consolidation was made. It was held that the corporation formed by the consolidation was not affected by the constitutional prohibition, and that the subscription authorized by the original Territorial charter might be made without regard to the constitution. This decision seems conclusive of the case at bar.

And see

County of Calloway vs. Foster, 93 U. S., 567.

It is held in *Tennessee vs. Whitworth, 117 U. S., 140-145-150,* that "when two corporations whose shares are by a State statute exempt from taxation within the State, and a third company created under the laws of another State,
101 consolidate *into a new company*, and issue shares in the new company in exchange for shares in the old companies, the right of exemption from taxation in the first State passes into the new shares and each of them, unless a law of the first State makes provision to the contrary.

The only case cited by counsel for defendant in error as authority to negative this proposition is *Shields vs. Ohio, 95 U. S., 319,* which is not authority, as the decision was controlled by a different statute, and the court. in its opinion, clearly distinguishes the case from the one at bar. The act under which the companies consolidated—which was general —provided in terms (see page 321) that such consolidated companies respectively "shall be deemed and taken to
102 be one corporation, possessing within the State all the rights, privileges and franchises, and subject to all the restrictions, liabilities and duties of such corporations of this State so consolidated."

As was said by MR. JUSTICE SWAYNE (see page 323), the new organization took the powers and faculties designated in advance in the acts authorizing the consolidation—no more and no less. *It did not acquire anything by mere transmission; it took everything by creation and grant.*"

In the case at bar the consolidated company took *nothing* by creation and grant, but everything by *transmission.* The distinction is too obvious to require argument.

103 The decision was by a divided court, MR. JUSTICE FIELD and MR. JUSTICE STRONG dissenting, and MR. CHIEF JUSTICE WAITE did not sit in the case nor take part in it. MR. JUSTICE STRONG was of the opinion that a new corporation was created, with the powers and restrictions of the constituent corporations; but held that, notwithstanding the Legislature had reserved the power to repeal, alter or amend the charter,

it was not competent for it to take away the rights conferred while subjecting it to all the duties imposed.

In the case at bar the right to amend or alter the charter was not reserved. The reservation was made by Section 22 of the original charter, but was repealed by Section 6,
104 Chapter 57, of the Special Laws of 1870; eleven years before the act of 1881 became a law.

I see no escape from the conclusion that the stockholders in the consolidated company are possessed of the rights, privileges, franchises, exemptions and immunities possessed by the stockholders of the constituent companies If it be true that the present consolidated corporation has legitimately succeeded to such rights and immunities, especially those guaranteed to the Minnesota Western Railroad Company by the Special Act of March 3d, 1853, the question as to whether such charter contract is impaired and vested rights infringed by the provision of the State Constitution, plainly pre-
105 sents a Federal question and assures the jurisdiction of this court.

VII.

The Constitutional provision impairs the obligation of the charter contract.

This court held, in the case of *Houston & Texas Railway Co., et al., vs. State of Texas, 170 U. S., 243, 261*, that the denial of a vested contract right impairs the obligation of a contract and is a deprivation of property without due process of law. Such, we claim, is the effect of the provision of the State Constitution, as applied to this case. The provision is
106 violative of Section 10, Article 1, and Section 1, Article 14, of the Federal Constitution.

In *Bank vs. Sharp, 6 Howard, 327*, this court said:

"One of the tests that a contract has been impaired is, that its value has by legislation been diminished. It is not, by the constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force."

In *Seibert vs. Lewis, 122 U. S., 294*, it is held to be the settled law of the nation that:

"The remedy subsisting in a State when and where a contract is
107 made and is to be performed is a part of the obligation of the contract, and a subsequent law of the State which substantially affects the remedy so as to lessen the value of the contract, impairs its obligation."

There can be no question that a law which imposes upon individual stockholders, personal liability for corporate debts

and grants to creditors of the corporation a remedy against such stockholders, diminishes the value of a charter which exempts the stockholders personally and withhold any remedy against them.

As MR. JUSTICE DAVIS said in *Ochiltree vs. Railroad Co., 21 Wallace, 252:*

108 "There are few persons who would consent to take stock in such enterprises, if subject to the double liability provision. Although willing to risk the loss of their stock, they would be unwilling to involve their estates beyond it."

While the decision of a State court may not be of great value here as authority, I will to call attention to the case of *Ireland vs. Turnpike Co., 19 Ohio State, 369, 371-2,* in which it is said:

"In our judgment, the act of May 3d, 1852, in so far as it authorizes assessments against stockholders who have paid the full amount of their subscriptions, and who by the charter of the company, or the laws under which it was organized, were not individually liable
109 for its debts, is unconstitutional. It impairs the validity of the contract between the company and the stockholder. In a contract between the company and a stockholder, or in an action for the former, or its creditors, against the latter, the stockholder is to be regarded as an individual person, separate and distinct from the corporation. He becomes a stockholder by virtue of a contract with the company, and he has a right to stand upon the terms of the contract, interpreted and limited by the laws under which it was made. By his contract with this company, Ireland agreed to pay a specified sum, and no more. This sum he has fully paid, and to require him to
110 contribute an additional amount would be to violate the contract between the parties. Let it be understood that the amount for which a stockholder becomes liable to the company by his subscription is not limited by his contract, but by the discretion of the directors, or the stockholders at large, and no prudent man will subscribe for stock in a corporation. If such be the law, it is of little importance to the subscriber whether the amount of stock taken be large or small, because it can be indefinitely increased at the pleasure of the company, whenever the Legislature sees proper to give the power to do so. If a subscriber contracts to pay a sum which he deems
111 within his means of payment, he may be called upon to contribute an amount utterly beyond those means, and which may render him bankrupt. No subscriber would be safe under such a law, or have any rule by which to determine the amount of stock he could afford to take. In vain would he look to the charter of the company, or to the provisions of the constitution and subsisting laws of the State, to learn the nature and extent of the liability he was about to incur, if that liability can, at the pleasure of the Legislature, be indefinitely increased or modified by retroactive laws."

It is not the desire of the plaintiffs in error to enter upon a discussion of the merits to any greater ex-
112 tent than is necessary to sustain the proposition that the case involves a Federal question; and further authority upon this branch of the case will not be cited at this time.

If a State be permitted to place a conclusive construction upon its contracts with individual citizens, the guaranteed protection of the Federal Constitution would be lost in all cases which such individuals or corporations were forced to litigate primarily in the State courts. Such courts might pronounce judgments in favor of the State in utter disregard of contract rights, and if the contract chanced to be in the form of a special act of the State Legislature, the wronged in-
113 dividual would be without remedy, but must, perforce, submit to the decision of the State, acting through its courts, construing the contract made by the State, acting through its Legislature.

VIII.

Counsel for defendant in error argues that the claim "that Section 3, Article 10, of the Constitution of Minnesota, as construed by the Supreme Court of Minnesota, and applied to the facts in this case, conflicts with the Federsl Constitution, in that it impairs the obligation of a contract contained in, and without due process of law deprives plaintiffs in error of property rights secured by the Minnesota Act of March
114 2d, 1881, was not raised upon the record prior to judgment in the Supreme Court of Minnesota.

This contention is without merit.

1. The defendant in error, in his amended complaint in the State court (Record, page 12, folios 23 and 24), affirmatively pleads the incorporation of the railway company in 1853, prior to the adoption of the State Coastitution; pleads the act of March, 1881, as an amendment to the original act—*by which it became a part of the act itself*—and pleads facts which bring the case at bar fully within the rule established by *Central R. R. Co. vs. Georgia, 92 U. S., 665*, and which distinguishes it from the exceptional cases wherein
115 it is held that anew corporation created by consolidation which did not succeed to the franchises of the constituent companies. The fact that the franchises, rights and property of the constituent companies were *merged* and *amalgamated*, as set forth in the amended complaint, insures the continuance of the immunity conferred by the original charter. They are two classes of cases, in one of which no new corporate franchises are granted to the consolidated company, but the existing franchises, immunities and rights of the constituent companies are amalgamated, merged, consolidated and continued. This is the class of cases covered by the decision in the case of *Central R. R. Co. vs.*
116 *Georgia, supra*, and numerous other cases hereinbefore cited, and such is the case at bar.

The other class of cases includes those wherein *new* corporate franchises and corporate rights are *created* by the law

under which the consolidation is had. An example of the latter class is found in the case of *Railroad vs. Georgia, 98 U. S., 359,* wherein the act providing for the consolidation specifically conferred upon the consolidated companies full corporate powers, including the right to acquire and hold property, to sue and be sued, to have a common seal, to make by-laws, and do everything of a corporate character. It was, for that reason alone, held that the corporate franchises of the constit-
117 uent companies were not continued to the new company. Such, also, is the case of *Shields vs. Ohio, supra.* The language of the complaint is conclusive against the contention of the defendant in error.

2. The act of March 2d, 1881, is but an amendment to the act of 1853. It is so entitled, and the plea in the answer of the plaintiffs in error, found on pages 43 and 44, folios 83 and 84 of the Record, that

"the said Minneapolis & St. Louis Railway Company was incorporated prior to the adoption or enactment of the constitutional provisions and statutes referred to That said Minneapolis & St. Louis
118 Railway Company was incorporated in the year 1853 under and pursuant to the provisions of Chapter 66 of the Special Laws enacted by the Legislature of the Territory of Minnesota, in the year 1853, under and by the name of the Minnesota Western Railroad Company, and which name was subsequently changed to the Minneapolis & St. Louis Railway Company, substantially as set forth in the first division of said complaint.

That the liability of the stockholders of said Minneapolis & St. Louis Railway Company was fixed by said act of incorporation, and not otherwise; and that the constitutional provision and laws
119 referred to in the complaint are not applicable to or binding upon these defendants in that behalf."

refers to the act of 1853 as amended, and as it existed at the time the answer was filed.

The amendment of March 2d, 1881, was a part of the act of which it was amendatory, and a rule of pleading requiring reference to every separate amendment to an act, is technical and wanting in merit. The amendment, when adopted, unquestionably became a part of the act itself.

3. The point was fairly presented in the assignments of error filed in the State Supreme Court. It was presented both generally and specifically.

120 Following are some of the assignments of error upon which the case was argued and submitted in the State Court (Record, pages 5, 6 and 7):

"III. The Court erred in holding that the Charter of the Minnesota Western Railroad Company, afterwards called the Minneapolis & St. Louis Railway Company, was ever amended so as to impose a double liability on the stockholders of said company, either by constitutional enactment or ancillary legislation, during the period throughout which said charter was subject to amendment.

"IV. The Court erred in holding that the double liability ever attached to the stock of any one of the four corporations which
121 entered into the consolidation agreement of 1881.

"V. The Court erred in holding that Section 3, Article 10, of the State Constitution, which imposes a double liability upon the stockholders of corporations (other than manufacturing or mechanical corporations), applies to corporations created before the adoption of said constitution.

"VI. The Court erred in holding that Section 3, Article 10, of the State Constitution, imposing a double liability on the stockholders of corporations (other than manufacturing or mechanical corporations), ever applied to the Minnesota Western Railroad Company, the
122 defendant railway company, or to the Minneapolis & Duluth Railroad Company.

"VII. The Court erred in holding that Section 3, Article 10, of the State Constitution, if applied to the defendant railway company, did not violate Section 10, Article 1, of the Constitution of the United States, in that the provisions of said Section 3, Article 10, impaired the obligation of the charter contract contained in said Chapter 66, Laws of 1853, Territory of Minnesota.

"VIII. The Court erred in holding that Section 3, Article 10, of the State Constitution, if applied to the defendant railway company,
123 is not in violation of the Fourteenth Amendment to the Constitution of the United States, in that the State of Minnesota, by and through the provisions of said Section 2, Article 10, assumed to impair and destroy rights theretofore vested in said defendant.

"IX. The Court erred in holding that Section 3, Article 10, of the State Constitution, if applied to the defendant railway company, is not in violation of the Fourteenth Amendment to the Constitution of the United States, in that the State of Minnesota, by and through the provisions of said Section 3, Article 10, assumes to abridge the privileges and immunities of the defendants as citizens, and to deny to
124 defendants the equal protection of the laws, and to deprive them of their property without due compensation or due process of law.

"XIII. The Court erred in holding that, by the passage of Chapter 113, Special Laws, 1881, the Legislature intended to abridge, or modify or repeal, and that said law did in fact abridge, modify or repeal any of the rights, privileges or immunities theretofore possessed by the corporation theretofore known as the Minneapolis & St. Louis Railway Compay.

"XIV The Court erred in holding that if, under Chapter 113, Special Laws 1881, there was in fact created a new corporate entity, such
125 new corporate entity did not possess all the rights, privileges and immunities, including exemption from double liability upon its stock, originally possessed by the corporation created under Chapter 66, Laws of 1853, Territory of Minnesota, and also possessed by the other corporations entering into said consolidation agreement."

If the adjudication of a Federal question is necessarily involved in the disposition of a case by a State court, it is not necessary that it should appear affirmatively in the record or in the opinion of the court that such a question was raised and decided.

Kaukana Water Power Co. vs. Green Bay & Miss.
126 *Canal Co., 142 U. S., 254.*
Roby vs. Colehour, 146 U. S., 153.

In order to preclude this court from taking jurisdiction, it must appear that the decision of the State court was made upon rules of general jurisprudence, or that the case was disposed of there upon other grounds, *broad enough in themselves to sustain the judgment without considering the Federal question*, and that such question was not necessarily involved.

New Orleans vs. New Orleans Water Works Co., 142 U. S., 79.

It is indeed difficult to find any rule of general jurisprudence to support the decision which we ask this court
127 to review. Upon its face it is an express violation of the contract embodied in Sections Twelve and Fourteen of the Special Act of 1881, under which the consolidation agreement was made, and the provisions of the general law of the State.

The State Legislature having continued and expressly preserved the original immunity, the decision stands squarely upon the proposition that the State Constitution was effective to take it away. We say, that by this decision our charter contract is impaired and our property taken
128 without due process of law. These are Federal questions.

The assumption upon the part of counsel for defendant in error that the Fourteenth Amendment is not applicable, because it was adopted subsequent to the adoption of the State Constitution, is not in accordance with the law.

Acts which are, by the Fourteennth Amendment, declared to be in violation of personal rights, are controlled by its provisions if committed subsequent to its adoption, although the law which assumed to authorize the act complained of is older than the amendment.

See

Kaukana Water Power vs. Green, 14 United States, 254, 269.

Neal vs. Delaware, 103 United States, 370, 389, 400.

IX.

Section 2 of Article 10 of the Constitution of Minnesota provides that no corporation shall be formed under special acts except for municipal purposes.
129 The construction placed upon the Special Act of March 2d, 1881, by the Supreme Court of the State, brings that act in conflict with the State Constitution. This construction is in violation of the rule laid down both by this court and the courts of Minnesota, that where a statute can

be so construed that it will be in accordance with, rather than in violation of a constitution, the former construction must be adopted.

The State court holds of its own motion, and in the utter absence of such an issue, that the acceptance of the act estops the constituent companies and their stockholders from questioning its constitutionality. The State itself asserts
130 the validity of the act as a basis for imposing the stockholders' liability. Unless the act be valid, there is no new corporation. If the State asserts its validity and the plaintiffs in error are estopped to deny its invalidity, the act is, as to this case, wholly valid. If valid, both parties are bound by its provisions and conditions. The State cannot deny the validity of that which it has expressly validated.

Houston & Texas R. R. Co. vs. Texas, 170 U. S., 259.

The constituent companies accepted the act as a whole, and entered into the consolidation agreement upon the condition that all their franchises, exemptions and immunities are to remain intact and inviolate. The State is estopped
131 to assert that the act is valid to create a new corporation, and invalid to protect the franchises conferred upon that corporation by the act itself. It is valid or it is not. If valid, the stockholders are exempt from personal liability by virtue of the act. If invalid, they are exempt by virtue of the original charters.

The Supreme Court of Minnesota said, in respect to this same case, *in re Minneapolis & St. Louis Railway Company, 36 Minn., 486:*

"If the consolidation agreement is void because the special act in question is unconstitutional, then the St. Louis Company, whose existence and organization under its original charter, and the acts
132 amendatory thereof, cannot be questioned here, has never been merged or ceased to exist, and may be deemed to be the corporation represented in these proceedings. Its franchises continue to be exercised, and this court cannot institute a collateral inquiry as to the rights of stockholders, or whether the present officer and manager has been regularly and legally elected and placed in control of its affairs or not."

X.

It is conceded by the State court that its construction of the Special Act of March 2, 1881, brings the act itself in conflict with Section 2, Article 10, of the State Constitution, which forbids the formation of corporations by special act.
133 The decision of the State court is a concession that the stockholders of each constituent company were exempt from personal liability; that the special act is violative of the State Constitution; that the construction claimed by plaintiffs in error will bring it in accord with the constitution; yet

the stockholders are held to be liable. The logical conclusion from a holding that perforce makes the special act unconstitutional, would be that the consolidation, being unauthorized, is void, and the constituent corporations still exist; as was held *in re Minneapolis & St. Louis Railway Co., 36 Minnesota, 486.*

Plaintiffs in Error are not estopped to deny the
134 *constitutionality of the act.*

The State court holds that, although the act is unconstitutional, the plaintiffs in error are bound thereby, having accepted its provisions and entered into the consolidation agreement pursuant thereto.

The act was accepted in the belief that it would be construed as it was construed by the parties accepting it—in accordance with the constitution. We cannot acquiesce in the justice of a ruling by which a statute capable of a construction in accordance with the settled principles of law and the constitution of the State is accepted by the interested parties, presuming that it will receive such construction, is so
135 construed as to violate the constitution, and thus deprive these plaintiffs in error of the benefit of the conditions which led to its acceptance.

This statute is a contract which was not construed by any court until after it was accepted and acted upon; and we appeal to this court to now construe it in accord with what we believe to be substantial justice.

If the act is unconstitutional it is void. An unconstitutional law is no law. It confers no right, it imposes no duties, it affords no protection, it creates no office,—it is as inoperative as if it had never been passed.

136 *Norton vs. Shelby County, 118 U. S., 425, 442.*

"The powers of the Legislature are derived from the constitution, and are subordinate to it. They are but one branch of the sovereignty, their acts depend upon are limited by, and must be conformable to the constitution. Every act of the Legislature repugnant to this written fundamental law is void."

Dwarris on Statutes, 45, 46.

The ruling of the State Supreme Court that plaintiffs are estopped to assert the invalidity of this statute which, as construed by that court is wholly void, is entirely without support. The question was not suggested by the pleadings nor argued by counsel.

137 It is only when parties have procured the passage of an act under which they have acted and obtained benefits that they are estopped to assert its unconstitutionality. Such is not the case here. The plaintiffs in error derive no advantage from a holding that the act is unconstitutional. It is their contention that the act was what its title states it to

be—an amendment to the Territorial act of March 2, 1853—not intended or designed to create a new corporation, nor to grant new franchises—but to authorize a consolidation agreement which should merge the constituent companies in the Minneapolis & St. Louis (Minnesota Western) Railway
138 Company, and amalgamate, merge and continue all the franchises of each constituent company under the rule laid down in the cases herein cited. Such construction brings the act in accord with both Federal and State Constitutions, with the former decisions of the State Supreme Court, makes the act itself effective in accordance with its expressed terms, and preserves the immunity of the stockholders.

The construction of the State court violates both Federal and State Constitutions, defeats the plainly expressed purpose of the State Legislature, and asserts an estoppel against the plaintiffs in error, notwithstanding they have at all times predicated their rights upon a construction of the law
139 which is in accord with the constitution.

In *Town of South Ottawa vs. Perkins*, *94 U. S., 267*. MR. JUSTICE BRADLEY says:

"There can be no estoppel in the way of ascertaining the existence of a law. That which purports to be a law of a State is a law, or it is not a law, *according as the truth of the fact may be*, and not according to the shifting circumstances of the parties. It would be an intolerable state of things if a document purporting to be an act of the Legislature could thus be a law in one case and for one party, and not a law in another case and for another party: a law to-day, and not a law to-morrow; a law in one place and not a law in another in the
140 same State. And whether it be a law, or not a law, is a judicial question to be settled and determined by the courts and judges. The doctrine of estoppel is totally inadmissable in the case."

The case lacks every element of estoppel. There has been no act by the plaintiffs in error inconsistent with the construction for which they contend. This claim is a judgment in a personal injury case—a tort. No credit was extended by the defendant in error in reliance upon the liability of stockholders. Every act of the plaintiffs in error has been consistent with the validity of the act of 1881, con-
141 strued in accordance with the State and Federal Constitutions. Correctly construed, the statute is valid.

The case of *Eustis vs. Bowles*, *150 U. S., 361*, cited by counsel for defendant in error, is no authority upon this question. In that case the plaintiff, Eustis, knowing the facts and the law, which were plain and unambiguous, elected to accept the composition and the dividend, and was held estopped by his own action, which was taken knowingly and understandingly In the case at bar the stockholders accepted the act of 1881 because they believed that all existing franchises and immunities were preserved; the assurance being in the language of the act itself. *Instead of misleading the*

142 *State, they were misled by the State*, which now denies the validity of its own agreement, by which the acceptance of the act was brought about.

XI.

Plaintiffs in error in accepting the Special Act of March 2d, 1881, relied upon the decisions of the highest court of Minnesota, which held:—

In *Robertson vs. Sibley, 10 Minn., 323 (Gil. 253-256)*, that stockholders in corporations created prior to the State Constitution are not liable for corporate debts.

In *State vs. Town of Clark, 23 Minn., 422-428-429*, and *St. Paul vs. Railway Co., 23 Minn., 474-475*, that the contracts embodied in Territorial charters are not affected
143 by constitutional provisions subsequently adopted.

In *Hillebert vs. Porter, 28 Minn., 497*, and *State vs. Foley, 30 Minn., 353*, that the existing law of the Territory entered into the charter contract.

In *Huff vs. Winona & St. Peter R. R. Co., 11 Minn., 180 (Gil. 114)*, (see particularly page 124, Gilfillan Edition), and *R. R. Co. vs. Parcher, 14 Minn., 297, (Gil. 224)*, (see particularly page 235, Gil. Ed.), that existing franchises may be transferred or continued to a new corporation.

The last proposition is also affirmed by Chapter 94, General Laws, 1881.

144 All these decisions were made prior to the enactment of the Special Act of 1881, under which the consolidation agreement was made. It is well settled that where the courts of a State have declared the law upon a given subject, and parties have acted in accordance with such decisions, the law must be taken to be as so declared, whether such decision be in fact right or wrong.

In the case of *City vs. Lamson, 9 Wallace, 478*, the Supreme Court of Wisconsin had at one time held that a certain act which authorized the City of Kenosha to issue bonds was valid, and that the bonds were issued in reliance upon
145 such decision. The same court afterwards held the act unconstitutional. This court held that, although the law was in fact unconstitutional and had been so declared, the fact that the Supreme Court of Wisconsin had, at the time the bonds were issued, declared it valid, made it so as to that transaction.

In the case at bar the Supreme Court of Minnesota as-

sumes and attempts to unmake the law which it has heretofore made, and in reliance on which the consolidation contract was entered into.

146 XII.

Counsel's argument upon the motion to affirm, is limited to the assertion that the question involved is frivolous. The argument is easy, but not convincing. It may be the best one available.

The question which absolutely controls this case upon the merits, is this:—

Are the franchises, rights, privileges and immunities possessed by the consolidated company the same
147 *franchises, rights and immunities originally granted to the several constituent companies, or are they new rights, franchises and immunities created and first brought into existence by the act of 1881?*

If they are the ones first created, the fact that they have been united does not lessen, impair or affect them. If they are *the same*, they are necessarily unchanged and unimpaired.

If they are *new* franchises granted in 1881, the case was rightly decided.

In the determination of this pivotal question, the fol-
148 lowing conceded facts are controlling:

1. Until June, 1881, when the consolidation agreement became effective, the rights and franchises of the several companies remained as when granted.

2. Prior to the approval of the Special Act of 1881, authorizing the consolidation, no attempt was made to alter, amend, repeal, or in any way impair the charter rights or privileges of the constituent companies.

3. At that date (March 2d, 1881) the Legislature was without power or authority to amend, alter or in any respect impair such rights, privileges and franchises, because Section 22 of the Charter Act of 1853, reserving such power to
149 the Legislature, had been repealed by Section 6 of Chapter 57 of the Special Laws of 1870.

4. The Special Act of 1881, authorizing the consolidation, does not assume to create or grant any new rights, privileges or franchises; but specifically and in terms (see Sec. 12) continues to the new corporation, *first*, all the rights and franchises of the constituent companies, and *second* (see Sec. 14), all the rights and franchises of the Minnesota Western Railroad Company under the charter of 1853.

5. Section 2 of Chapter 94, of the General Laws of 1881, provides that when railroad corporations, whether organized under the general law or by virtue of a special charter
150 of the State or Territory of Minnesota, or under the laws of any other State or States, or Territory, consolidate, "the said corporations shall become merged in the new corporation provided for in said articles, to be known thereafter by the corporate name therein adopted, and shall, within this State, succeed to all the rights, powers, franchises, contracts, privileges, immunities, liabilities, obligations and duties, liabilities to or exemption from taxation, commutations, property, real, personal and mixed, and things in action, *as fully in all respects as the same were possessed by said old corporation or corporations at such time under the laws*
151 *of this State; and such new corporation shall hold and enjoy the same, and each and every part thereof, without change, and as fully as if said consolidation had not taken place.*" This determines the power of the State to transfer franchises.

Upon these propositions, each of which is incontrovertible and must be conceded, there can be but one answer to the question upon which this case depends.

Respectfully submitted,

ALBERT E. CLARKE,

Attorney for Plaintiffs in Error.

CHAPTER 66, SPECIAL LAWS, 1853.

An Act to Incorporate the Minnesota Western Railroad Company.

Be it enacted by the Legislative Assembly of the Territory of Minnesota:

Robert J. Walker, A. Hyatt Smith, Joseph B. Doe, Otis Hoyt, Benjamin Allen, H. M. Rice, Franklin Steele, Socrates Nelson, H. Z. Hayner, Martin McLeod, Alexander Wilkin, M. S. Wilkinson and N. Greene Wilcox, together with such other persons as may hereafter become associated with them in the manner hereinafter prescribed, their successors and assigns, are hereby created a body corporate, by the name of the Minnesota Western Railroad Company, and by that name shall be and are hereby made capable in law, to purchase, hold and enjoy, and retain to them and their successors, lands,
152 tenements and hereditaments, so far as may be necessary for the purpose of said railroad, and the same to sell, grant, rent, or in any manner dispose of, to contract and be contracted with, to sue and be sued, implead and be impleaded, answer and be answered, defend and be defended, and also to make, have and use a common seal, the same to alter, break or renew at their pleasure; and if either of the persons named in this section shall die, refuse or neglect to execute the powers and discharge the duties hereby created, it shall be the duty of the remaining persons hereinbefore named, or a majority of them, to appoint a suitable per-
153 son or persons to fill such vacancy or vacancies, so often as the same shall occur.

SEC. 2. The said corporation are empowered to cause such examination or surveys to be made as shall be necessary to ascertain the most advantageous route whereon to construct a railroad, and shall cause an estimate to be made of the probable cost thereof. And the said corporation shall be, and they are hereby invested with the right to construct a railroad, with one or more railways or tracks, from some convenient point to be selected on Lake St. Croix, or St. Croix River, thence running to the town of St. Paul and the Falls of St. Anthony, on the Mississippi River; thence across
154 said river, by the most feasible route, to the western boundary of said Territory, at such point as shall be deemed most expedient by said company, with a branch to the Red River, to a point to be selected on said river, and also

a branch running to a point to be selected on the St. Louis River, if deemed advisable by said company.

SEC. 3. The capital stock of said corporation shall be Two Million of Dollars, and shall be divided into shares of one hundred dollars each, and five dollars on each share shall be paid at the time of subscribing.

SEC. 4. The above named persons, or a majority of
155 them, are authorized to open books for receiving subscriptions to the capital stock of said company, and shall prescribe the form of such subscription, which books shall be opened at such place or places as they may deem expedient, by giving thirty days notice in some newspaper printed in the Territory of Minnesota, and in such other place or places as may be thought advisable, of the time and place, or time and places of opening; said books to be kept open thirty days.

SEC. 5. So soon as said stock, or one hundred thousand dollars thereof, shall have been subscribed, the above named persons, or the same number thereof as shall have giv-
156 en the notice above required, shall give like notice for the meeting of the stockholders to choose directors, at some time at least thirty days thereafter, and at some place within said Territory of Minnesota. And if at such time and place the holders of one-half or more of said stock subscribed, shall attend either in person or by lawful proxy, they shall proceed to choose from the stockholders, by ballot, nine directors, each share of capital stock entitling the owner to one vote, and at such election the persons named in the first section of this act, or those appointed by its provisions to fill vacancies which may have occurred, or any three of them,
157 if no more be present, shall be inspectors of such election, and shall certify in writing, signed by them, or a majority of them, what persons are elected directors, and if two or more have an equal number of votes such inspectors shall determine by lot which of them shall be directors, to complete the number required, and shall certify the same in like manner; and such inspectors shall appoint the time and place of holding the first meeting of directors, at which meeting five shall form a board competent to transact all business of the company, and thereafter a new election of directors shall be made annually, at such time and places as the stock-
158 holders at their first meeting shall appoint, and if the stockholders at their first meeting shall fail to appoint the day of such election, then it shall be holden in the succeeding year, on the same day of the same month on which said first election was holden, unless the same shall be on the first day of the week, in which case it shall be holden on the day next succeeding; and if no election be made on the day appointed, said company shall not be dissolved; but said election may be made at any time appointed by the by-laws of said company; the said directors shall elect one of their number president, and shall appoint a secretary, treasurer,

such engineers and other officers as they may find necessary, shall fix their compensation, and may require adequate security for the performance of their respective trusts.

SEC. 6. The directors may receive payment to the subscriptions to the capital stock at such time, in such proportion, not exceeding twenty-five per cent. at any one installment, under such conditions as they shall deem fit, under the penalty of forfeiture of all previous payments thereon, or otherwise; *provided*, they shall never require the payment to be made at any place out of the counties through which said road shall pass. And such directors shall, at least thirty days previous to the appointed time of such required payment, give notice thereof in the manner required in the fourth section of this act for giving notice of the opening of the books of subscription for the stock of said company.

SEC. 7. The directors of said company shall have power to make, from time to time, all needful rules, regulations and by-laws touching the business of said company, and to determine the number of tracks and railways upon such road, and the width thereof, and the description of carriages which may be used thereon, to regulate the amount of tolls and the manner of collecting the same, for such transportation, and to fix penalties for the breach of any such rules, regulations or by-laws, and to direct the mode and condition of transferring the stock of said company; and penalties provided for by the said by-laws may be sued for by any person authorized thereby, in the name of said company, and recover in a civil action before any court having jurisdiction of the amount, and the said company may erect and maintain toll houses and such other buildings and fixtures as the accommodation of those using said road may require.

SEC. 8. The said company may construct the said railroad across any public or private road, highway, stream of water, or water course, if the same shall be necessary; but the said company shall restore such road, highway, stream of water or water course, to its former state, or in a sufficient manner not to impair its usefulness to the owner or to the public.

SEC. 9. So soon as the amount of tolls accruing and received from the use of said road, or part thereof, according to the provisions of this act, shall exceed six per cent. on the amount of said capital stock paid in, after deducting therefrom the expenses and liabilities of said company, the directors of said company shall make a dividend of such net profits among the stockholders, in proportion to their respective shares, and no accumulative fund exceeding one per cent. of the profits of said company shall remain undivided for more than six months.

SEC. 10. If any person or persons shall wilfully obstruct or in any way spoil, injure or destroy said road or any of its depots, cars, store houses, buildings, machine shops or other

fixtures, or anything belonging or incidental thereto, or any materials to be used in the construction thereof, or any
164 building, fixture, or carriage erected or constructed for the use and convenience thereof, such person or persons shall each be liable for every such offense to treble the damages sustained thereby, to be recovered in a civil action in any court having jurisdiction of the amount.

SEC. 11. Whenever it shall become necessary, in the location or construction of said road, to pass through the land of any individual, it shall be the duty of said company to provide for said individual proper wagon ways, and all necessary roads and passages across the track of said railroad, or otherwise the company shall be liable to such individual in
165 treble the amount of damages occasioned by such neglect.

SEC. 12. Said company shall have power to increase its capital stock six millions of dollars.

SEC. 13. Said company shall have power to increase its number of directors to any number not exceeding fifteen.

SEC. 14. The said company shall have the right to enter upon any lands, to survey and lay down said road, not exceeding one hundred and thirty feet in width, except where it is necessary to leave room for turn outs, sites for water, buildings, conduits and tank sites, for depots and store hous-
166 es, machine and other shops, and the extra tracks therefor, and whenever it is necessary to have such lands, they shall have the right to enter upon, take, hold and occupy such lands, and also to enter upon any lands adjoining said road, and obtain therefrom sand, gravel, stone and other materials as may be necessary for the construction of said road, and whenever any lands or materials shall be required for the construction of said road, and the same shall not be given or granted to said company, the compensation to be paid therefor by said company shall be ascertained in the manner following, to-wit: Said company shall apply to the Judge
167 of the District Court of the Territory of Minnesota for the appointment of three commissioners, whose duty it shall be, at the earliest practicable time after their appointment, to proceed to examine and assess the damages which may be sustained by the several owners or claimants of the lands through which the road of said company is located, and the said commissioners, in assessing said damages, shall deduct therefrom the benefit which said lands receive by the construction of said road. It shall be the duty of said company to give thirty days' notice of their application for the appointment of said commissioners, in one or more
168 newspapers published in each of the counties through which said road is laid out, and in case no newspaper is published in any one of said counties, then by posting up such notice on the door of the court house in said county, thirty days before the time of making such application, and it shall be the duty of said commissioners to cause ten days'

notice of their meeting to appraise the damages of any lands through which said road may run, to be given to the owner or claimant thereof, and, in case said owner or claimant shall be a minor, insane person or unmarried woman, then such notice shall be given to the guardian, committee
169 or husband of such minor, insane person or unmarried woman. Either party feeling himself aggrieved by the decision of said commissioners may appeal to the District Court of the county in which said lands may be situated, and said appeal shall be tried in the same manner as any suit commenced therein. *Provided*, That said company shall not in any manner be delayed in the construction of their road by any such appeal, but may proceed immediately with such construction on paying into the office of the clerk of said court the amount of moneys awarded to the owner or owners of such lands, and filing a bond with said clerk, to said owner or owners,
170 binding such company to pay such further sum as may finally be awarded against said company. The notice to be given by the commissioners to the owners of lands required for the railroad shall be in writing, and delivered to said owner or owners, or left at their usual place of residence, if residents of this Territory, or, if non-residents, then said notice to be given in a newspaper published in the county in which such land is situated, at least four weeks before making said appraisement.

SEC. 15. Said company is hereby authorized to borrow money to be expended in the construction and equip-
171 ment of their said road and its appendages, and to issue bonds for the payment thereof, in the usual form; such bonds not to exceed in the aggregate, at the period of the completion of said road, three-fourths of the whole amount actually expended on said road and its appendages aforesaid; and may make and execute, in the corporate name of said company, all necessary mortgages, writings, notes, bonds or other papers, for any liability that it may incur in the construction or equipment of said road.

SEC. 16. The said company is hereby authorized and empowered to construct their said railroad and its branch-
172 es in sections as fast as they may obtain the means for so doing; and the franchise of the portions so completed and put in operation shall vest in said company, the same as though the whole was completed.

SEC. 17. Said company is authorized and empowered to connect its road with the road of any railroad company or companies in the Territory of Minnesota; or to become part owner or lessee of any railroad in said Territory, and any railroad company in said Territory of Minnesota, duly organized under the laws of said Territory, may connect its road with the road of said company, and may in like manner, with the
173 consent of said company, become part owner or lessee of the road of said company, or any of its branches, or any portion thereof, situated in this Territory.

SEC. 18. The fee simple of all lands granted, along the line of said road or otherwise, by the Congress of the United States, for the purpose of aiding in the construction of said road, may be directly granted to said company, and shall be vested in or transferred to said company, and said company is hereby authorized to receive the title thereto, and is hereby empowered to transfer just and proportionate parts of said lands from time to time, and to convey in fee simple
174 or otherwise, as soon and as often as five miles of said road shall be constructed and completed, and the track thereof shall be put in running order, and this grant shall not become void, nor this company be dissolved, by the non-completion of the entire extent of said road, but shall be good and valid, to all intents and purposes, for the parts or portions of said road completed, and said company shall continue and survive to that extent.

SEC. 19. This company shall have power to enter upon and pass over the railroad of any other company whose railroad connects with that of this company, with their cars
175 and engines, and any other company shall have like power to enter upon this railroad, whose railroad connects with this railroad, and pass over the same with their cars and engines; and such reciprocal use of said respective railroads shall be upon terms to be agreed upon by the officers of the respective companies, and in case such terms cannot be agreed upon by said officers, then an application may be made by either party to the Supreme Court of this Territory, whose duty it shall be to fix such terms for the respective parties as the equity of the case may demand.

176 SEC. 20. The said Minnesota Western Railroad Company shall commence and complete their said road from the St. Croix Lake or St. Croix River to St. Paul within six years from the passage of this act.

SEC. 21. This act shall be favorably construed in all legal and equitable proceedings for the accomplishment of the objects intended by this act.

SEC. 22. The Legislature may at any time amend or alter this act. *(Repealed Feb., 1870.)*

Approved March 3, 1853.

SECTION 5, CHAPTER 57, SPECIAL LAWS OF 1870.

177 SEC. 5. Section twenty-one of said act, approved March third, one thousand eight hundred and fifty-three, is hereby amended by adding to the end thereof the following words: And said company may, by a resolution of its board of directors, change the name of said company and adopt any suitable name, by which said company shall in future be known, and may designate the name by which any branch line shall be known, to take effect after public notice of such change shall be given for one month in any daily paper published at the City of Minneapolis, but such change of name shall not affect any rights or liabilities of said
178 company under any former name. And said company shall have power to create and issue, in such manner and on such terms as it may deem expedient, one or more classes of preferred stock and special stock, and to make such agreements as it may deem proper with the respective holders thereof, as to the dividends thereon, and the securities for such dividends; and to make such agreements as it may deem proper with the holders of any such special stock for the appropriation of the net earnings of any portion of the railroad which it may construct or otherwise acquire to the payment of dividends on such special stock as may be
179 issued in respect thereto, which appropriation, as made by such agreement, shall be effectual to secure to the said and future holders of such stock, the application of such net earnings as in the said agreement provided, against any future act of the company or any of its general liabilities. And the said company may make such agreements as it may deem proper with the holders of any such special stock as to the construction and administration of the portion of said railroad to which said stock may pertain; and for the separate organization of the holders of such special stock for the purpose of that construction and administration, and en-
180 abling them, or directors chosen by them, separately or in conjunction with the other directors, to exercise, in respect to the portion of the road to which such special stock may pertain, all the powers of the company, subject to the provisions of such agreement, when made and entered into. * * * * *

CHAPTER 113, SPECIAL LAWS 1881.

An Act to amend an Act entitled An Act to Amend an Act entitled An Act to Incorporate the Minnesota Western Railroad Company, approved March third (3d), one thousand eight hundred and fifty-three (1853), and the acts amendatory thereof, approved February
181 *fourth, one thousand eight hundred and seventy (1870).*

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That the act entitled an act to amend an act entitled an act to incorporate the Minnesota Western Railroad Company, approved March third (3d), one thousand eight hundred and fifty-three (1853), and the acts amendatory thereof, approved February fourth (4th), one thousand eight hundred and seventy (1870), be amended by adding thereto the following sections, to-wit:

182 SECTION EIGHT (8). The Minneapolis & St. Louis Railway Company, formerly known as the Minnesota Western Railroad Company, in addition to the powers already conferred upon it by the laws of the Territory of Minnesota and of the State of Minnesota, is hereby authorized to make or acquire, from time to time, any extension of the lines of railway now owned or operated by it, or of those hereafter constructed and operated by it according to law, into the State of Iowa, Missouri, Kansas, Nebraska and Wisconsin, and into the Territory of Dakota, or into one or more of the same. *Provided*,
183 That authority shall exist or be given in or by the States or Territory into which its lines are so extended to make or acquire and maintain such extensions.

SECTION NINE (9). The said Minneapolis & St. Louis Railway Company shall have power to acquire, from time to time, by lease or purchase, or exchange of stock or otherwise, any other railroad or railroads, whether within or without this State, whose lines connect with its own lines as they now exist or as they shall be extended, either directly or by means of intervening lines. Such acquisition shall be made upon
184 such terms as shall be agreed upon by a contract in writing between the respective corporations. But the same shall not be consummated until first approved by

two-thirds in amount of the stockholders of each such corporation, either given at a regular or called meeting of such stockholders, or by a consent expressed in writing. In either case a copy of such contract, together with the evidence of such consent of the stockholders, shall be filed in the office of the Secretary of State.

SECTION TEN (10). It shall and may be lawful for the said Minneapolis & St. Louis Railway Company to merge and consolidate its capital, franchises and property with the
185 capital stock, franchises and property of any other railroad company or companies organized under the laws of this State or under the laws of any other State or Territory of the United States, in the construction of whose lines the said Minneapolis & St. Louis Railway Company shall have aided, or whose lines of railroad are or shall, at the time of such consolidation, be held under lease by the said Minneaplis & St. Louis Railway Company. *Provided*, That the lines of railway of the companies or corporations so consolidating shall form a continuous line of railway with each other, or by means of any intervening railway, bridge or ferry. But
186 no such consolidation shall be made by the said company with any other railroad corporation, or the lesses, purchaser or manager of any railroad corporation owning or controlling a parallel or competing line.

Such consolidation shall be made under the conditions, provisions and restrictions, and with the powers hereinafter mentioned and contained, that is to say:

First (1st). The dirccctors of the company proposing to consolidate may enter into a joint agreement, under the corporate seal of each company, for the consolidation of said companies and railroads, which agreement shall prescribe the terms
187 and conditions thereof, and the mode of carrying the same into effect, the name of the new corporation, which may be the name of either corporation party thereto, or any other name, the number, names and places of residence of the directors and other officers thereof, who shall be the directors and officers thereof for the first (1st) year. The amount of the capital stock of the new company, which shall not exceed the amount of twenty million (20,000,000) dollars, the number of shares into which such capital stock is to be divided (which stock may be divided into classes, with such preferences in respect to any of the classes as may be agreed upon),
188 the amount or par value of each share, the manner of converting or exchanging the capital stock of each of the said companies so consolidating into or for that of the new corporation and the terms of such conversion, the manner of compensating stockholders in each of the old corporations who decline to convert their stock into the stock of the new corporation, and how and when directors and officers shall be chosen, with such other details as they shall deem necessary

to perfect such new organization and the consolidation of such companies or railroads.

Second (2d). Such agreement of the directors shall
189 not be deemed to be the agreement of the said old corporations until after it has been submitted to the stockholders of each of the said corporations, separately, at a meeting thereof, to be called upon a notice of at least thirty (30) days, specifying the time and place of such meeting and the object thereof, to be addressed to each of such stockholders when their place of residence is known, and deposited in the postoffice, and published at least three (3) successive weeks in one newspaper in each of the cities, counties or towns in which the said corporations have their principal office or business, and is sanctioned by such stockholders by a
190 vote of at least two-thirds in amount of the stockholders present at such meeting, either in person or by proxy, each share of the capital stock being entitled to one vote; and when such agreement of the directors is so sanctioned by each of the meetings of the stockholders separately, it shall be deemed the agreement of the said old corporations.

Third (3d). If the holder of any stock in either of the corporations existing under the laws of this State and so consolidated at the time of making such consolidation, shall be dissatisfied with the same, the consolidated company shall pay to such dissatisfied stockholder or stockholders the full
191 actual value of his or their stock immediately prior to such consolidation, which value shall be assessed and fixed by three disinterested commissioners, appointed for that purpose by the Supreme Court of this State, upon the application of either party, made upon twenty (20) days' notice, but the said company shall not be compelled to pay for the stocks of such dissatisfied stockholder or stockholders unless he or they shall give written notice of such dissatisfaction to the president, secretary or treasurer of the company whose stock shall be held by him or them, within three (3) months after such consolidation shall have been consented to by
192 the requisite number of stockholders.

SECTION ELEVEN (11). Upon the approval of such agreement and act of consolidation as hereinbefore provided, and upon the filing of the same or a copy thereof, in the office of the Secretary of State, the said corporations, parties thereto, shall be deemed and taken to be one corporation, by the name provided in the said agreement and act, and the stock of the new corporation issued under the terms of such agreement and act of consolidation in exchange for the stock of the former companies, shall be deemed and taken as lawful stock, and subject only to such further payments, calls or assess-
193 ments, if any, as may be mentioned in the said consolidation agreement, and such new corporation shall pos-

sess all the powers, rights and franchises conferred upon each of its constituent corporations, and shall be subject to all the restrictions and duties imposed by the laws of the State.

SECTION TWELVE (12). *Upon the consummation of said act of consolidation as aforesaid, all and singular the rights, privileges, exemptions and franchises of each of said corporations parties to the same, and all the*
194 *property, real, personal and mixed, and all the debts due on whatever account to either of said corporations, as well as all stock, subscriptions and other things in action belonging to either of said corporations, shall be taken and deemed to be transferred to, and vested in such new corporation without further act or deed,* and all claims, demands, property, rights of way, and every other interest shall be as effectually the property of the new corporation as they were of the former corporations parties to the said agreement and act, and the title to all real estate, taken by deed or otherwise under the laws of this State, vested in either of said corporations, parties to said agreement and act,
195 shall not be deemed to revert or be in any way impaired by reason of this act, or anything done by virture thereof, but shall be vested in the new corporation by virtue of such act of consolidation.

SECTION THIRTEEN (13). The rights of all creditors of and all the holders of liens upon the property of either of said corporations parties to said agreement and act, shall remain and be preserved unimpaired, and shall be assumed and borne by the new corporation, and the respective cor-
196 porations shall be deemed to continue in existence so far as necessary to preserve the same, and all debts and liabilities incurred by either of said corporations shall thenceforth attach to such new corporation and be enforced against it and its property to the same extent as if said debts or liabilities had been originally incurred or constructed by it. No suit or action or other proceeding now pending before any court or tribunal in which either of said railroad companies is a party, shall be deemed to have abated or been discontinued by the agreement and act of consolidation as aforesaid, but the same may be conducted in the name of the ex-
197 isting corporation to final judgment, or such new corporation may be, by order of the court, on motion, substituted as a party; suits may be brought and maintained against such new corporation for all causes of action in the same manner as against other railroad corporations in this State.

SECTION FOURTEEN (14). All the provisions of the general laws of this State, in regard to railroad corporations, shall be applicable to any new corporations formed by consolidation under the provisions of this act, except so far as the same shall not be applicable thereto by reason of the situation
198 of portions of its line without this State. *Provided, that, nevertheless, the privileges, franchises, exemp-*

tions, immunities, hitherto granted to the Minneapolis & St. Louis Railway Company shall continue to and be vested in such new corporation with the same effect as if originally granted thereto, and that such new corporation may at any time hereafter be consolidated with any other railroad company or companies in the same manner and with the same effect as is by this act provided.

SECTION TWO. This act shall take effect and be in
199 force from and after its passage.

Approved this second day of March, A. D. 1881.

No. 160.

Reply Br. of Clarke for P. E.

FEB 26 1900
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES

Filed Feb. 26, 1900.

October Term, 1898.

Term No. 160.

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, *et al.*,

Plaintiffs in Error,

vs.

HENRY A. GARDNER,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

ADDITIONAL BRIEF OF PLAINTIFFS IN ERROR.

ALBERT E. CLARKE,
Attorney for Plaintiffs in Error.

W. W. DUDLEY,
L. T. MICHENER,
WILLIAM STRAUSS,
of Counsel.

SUPREME COURT OF THE UNITED STATES.

October Term, 1898.

Term No. 607.

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, *et al.*,

Plaintiffs in Error,

vs.

HENRY A. GARDNER,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

ADDITIONAL BRIEF FOR PLAINTIFFS IN ERROR.

Not being able to attend personally at the submission of this case, I respectfully submit this additional brief by way of reply to some suggestions made by counsel for defendant in error, in his brief filed January 1st, 1900.

2 I.

Counsel for defendant in error says, at page 12 of his brief:

"In their second assignment, plaintiffs in error assert that the State of Minnesota, by means of the provisions of Section 3, Article 10, of its constitution, has attempted, in violation of the Fourteenth Amendment of the Federal Constitution, to deprive plaintiffs in error of rights vested in them by the Act of 1881. I cannot discover that counsel for plaintiffs in error, in his brief filed on the motion to dismiss or affirm, has anywhere attempted an explanation of the claim con-
3 tained in this assignment. It cannot be, however, that the assignment is intended to set forth a claim that the provision of the Minnesota Constitution, which became operative in 1858, of itself destroys rights vested in plaintiff in error by the Act of 1881, or, in other words, impairs the obligations of a contract contained in that Act, for it has been decided too frequently to admit of such a contention, that only an act adopted subsequently to the making of the contract or the vesting of the rights asserted can furnish ground for such a claim."

In order that our position may now be fully and fairly explained, I quote the assignment in full as set forth on pages 5 and 6 of the brief for plaintiffs in error, upon the motion
4 to dismiss the writ of error and to affirm the judgment. The assignment is as follows:

"The Court erred in holding that Section 3 of Article 10 of the Constitution of the State of Minnesota is not violative of the Fourteenth Amendment to the Constitution of the United States, in that the State of Minnesota, by the provisions of said Section 3, assumes to impair and destroy rights vested in the plaintiffs in error by the special
5 act of the Legislative Assembly of the Territory of Minnesota, approved March 3d, 1853, entitled 'An Act to incorporate the Minnesota Western Railroad Company,' and by the special act of the Legislature of the State of Minnesota, approved March 2d, 1881, entitled 'An Act to amend an Act entitled an Act to amend an Act entitled An Act to incorporate the Minnesota Western Railroad Company,' ap-
6 proved March 3d, 1853, and the act amendatory thereof, approved February 4th, 1870."

The assignment is not intended to set forth a claim that the Minnesota constitution, which became operative in 1858, of itself destroys rights vested in plaintiffs in error BY THE ACT OF 1881, STANDING ALONE. The statement of the assignment is, that the constitutional provision, *applied to this case*, assumes to impair and destroy rights vested in the plaintiffs in error by the territorial act of 1853 AND by the act of 1881. Our position in the case is simply this:

The franchises, privileges and immunities guaranteed to the Minneapolis & St. Louis Railway Company by the
7 special act of 1853 were *perpetuated, confirmed and affirmatively continued by the act of 1881.* It is NOT claimed by the plaintiffs in error that new franchises, privileges or immunities were created or vested by the act of 1881. It IS claimed by the plaintiffs in error that Section 14 of the Act of 1881 (which is set forth in full at page 51 of our original brief), forms a condition and constitutes a part of the contract under which the plaintiffs in error *accepted* the act of 1881, and that the language of the Section referred to expressly and explicitly negatives the presumption that the exemption
8 from double liability was lost or surrendered by the acceptance of the act under which the consolidation was made.

The franchises were *created* and *granted* to the plaintiffs in error by the territorial act of 1853; they were *continued* by the act of 1881. The defendant in error is estopped to say that plaintiffs in error are subject to a constitutional liability under the consolidation authorized by the act of 1881, and at the same time deny them the exemption guaranteed by the language of the act which they accepted. It was intended by this assignment to present our claim of immunity under
9 the original contract embodied in the act of 1853 *and the guarantee of its continuance* by the 14th section of the Act of 1881.

On page 13 of the brief of defendant in error, counsel says:

"In their third assignment, plaintiff in error asserts *expressly* that *the enforcement* of Section 3, Article 10 of the Minnesota Constitution is in violation of the Federal Constitution, in that it impairs the obligation of the contract contained in the act of 1881."

This is a play upon words. By *"the enforcement"* of this constitutional provision, reference is had to the *application* of the provision to the case at bar.

It is familiar law that a law may be constitutional and valid as applied to one state of facts, or one case, and unconstitutional and invalid, as applied to *another* state of facts or another case. It is the application of the constitutional provision to the stockholders of a railroad company created before the constitution was enacted, which I perhaps inaptly termed "the enforcement" of such provision.

The act of 1881 is an amendment to the act of 1853, *expressly preserving and perpetuating the franchises and immunities which accompanied the creation of the corporation.*

It is said by the defendant in error, on page 14 of his brief, that

"It is not alleged by plaintiffs in error that the State through the agents of its legislative or its executive department or of any ministerial officer, or of any individual or corporation acting under its authority, has deprived plaintiffs in error of rights secured by the act of 1881, or that by means of any law passed subsequently to the passage of that act, the State has impaired the obligation of the contract contained in that act; but, in each case, the action complained of as a taking of property, or as an impairment of contract obligation, is the action of the State courts in misconstruing (so they assert) the act alleged to confer the rights or constitute the contract claimed.

That such judicial action cannot constitute a ground of jurisdiction in this court is too well settled to require argument or quotation from authorities."

Again, counsel misapprehends our position. The *law* to which we object is the constitutional provision. Limited to corporations whose franchises were not in existence at the time of its adoption, the provision of the State constitution is valid. Extended to those corporations whose franchises are older than the State constitution, its provisions are, *as to such corporations*, invalid, because it impairs their charter contract. That it was intended to apply to the latter class was the *judicial* question decided by the Supreme Court of Minnesota. *Thus construed*, and extended to the corporation in which the individual plaintiffs in error are stockholders, it impairs the charter contract of the corporation and violates the federal constitution. It is not the *decision* which impairs the contract, it is the *law, the provisions of the State constitution*, which the decision applies and construes, which impairs the contract.

II.

It may be conceded as an abstract proposition that the erroneous construction of a contract by a State court, will not confer jurisdiction on this court, but such concession
14 does not touch the merits of this case. The act of 1853 is our original charter, and constitutes the original contract between the plaintiffs in error and the State of Minnesota. The act of 1881 is an amendment to the act of 1853, so entitled and declared, and as such was accepted. It assumes to perpetuate and continue *all* the original franchises and immunities. This contract, as amended, came before the State courts for construction in the case at bar, *for the first time*. That being true and the construction of the State court bringing the State constitution in conflict with the constitution of the United States, this court is not bound
15 by the construction of the State court, but will construe the contract for itself. This rule applies because the charter contract was accepted before the State constitution was adopted, and because the consolidation agreement was entered into pursuant to the provisions of the Special Act of 1881 before that act had been construed by the State court. Abundant authority to support this proposition will be found at page 23 of the brief of plaintiffs in error on
16 the motion to dismiss and affirm.

The argument of the defendant in error contains this radical fault: It treats the act of 1853 as one contract, and the Act of 1881 as another contract. This is but partially true. The Act of 1881 *creates no franchises;* it perpetuates *existing* franchises; it constitutes a new contract to this extent only—by it, the State agrees with the corporation, that in case it enters into a consolidation agreement pursuant to the terms of the act, and thus technically creates a new corporation, all existing franchises and immunities shall nevertheless be continued and preserved. This contract may not be law-
17 fully impaired, and its impairment also violates the Federal Constitution and is within the second assignment of error.

III.

Again, it is said at page 22 of the brief of the defendant in error:

"Having determined that the Minnesota Western Railroad Company and the Consolidated Company were distinct and independent corporations, it (the Supreme Court of Minnesota) was not called upon to construe the Act of 1853."

This statement is made in support of the claim that the case was decided upon grounds which do not involve
18 the constitutionality of the law.

The argument is plausible, but unsound for two reasons:

1. A finding and decision that the consolidation of the constituent companies created a new corporation, does not avoid the constitutional question, because it is the settled law of Minnesota that existing franchises and immunities may be transmitted by the State Legislature unimpaired, *to a new corporation*, and this was specifically done by the act of 1881.

See Section Fourteen of the act, page 51 of our former brief.

The Decisions supporting this proposition will be found in the brief of the plaintiffs in error on the motion to
19 dismiss and affirm, *pages 13 to 15.*

It is also the general statute law of the State, Page 19 same brief.

The real question is not whether a new *corporation* was created by the consolidation, but whether new FRANCHISES were granted by the act of 1881 and came into existence by the consolidation.

The stockholders in each and all of the constituent companies were exempt from personal liability for corporate debts under their respective charters.

2. The construction of the contract made pursuant to the special act of 1881, and the construction of the contract between the State and the corporation, embodied in the same act, is for this court. If the act is valid as to plaintiffs
20 in error, it is valid as to the State. If it is valid as to the State, our franchises and immunities are continued, and the enforcement of the constitutional provision impairs the obligation of the contract by which they were first granted.

IV.

The Act of 1853 contained the following provision:

"The legislature may at any time amend or alter this act." (*Section 22.*)

This reservation was repealed by the Act of 1870; but while it was still in force the State Constitution was adopted and that instrument contained this provision:

"Each stockholder in any corporation shall be liable to the amount of stock held or owned by him."

It is argued by counsel for defendant in error that the adoption of this constitutional provision, of itself, amounted to an amendment of the charter of the railroad com-
21 pany, valid under the reservation contained in the charter.

It is true that "*In the matter of Oliver Lee & Company's*

Bank, 21 New York," cited by counsel, it was held that the charter of a bank organized under a general banking law was amended by the subsequent adoption of a constitutional provision. *The contrary rule obtains in Minnesota.* The State Supreme Court has held in three cases cited, at page 37 of the brief of plaintiffs in error on the motion to dismiss and affirm, that the contracts embodied in the territorial charters are not affected by constitutional provisions subsequently
22 adopted. This ruling is adhered to by the Supreme Court of the State of Minnesota in the case at bar. Had the State Court held in this case that the adoption of the constitutional provision operated as an amendment to the original charter, the case would have been quickly, and probably finally, disposed of. The opinion of the State Court, however, concedes that the constitutional provision does not affect the original charter, and is apparently based wholly upon the single conclusion that the consolidation agreement created a new corporation. At the time the consolidated company came into existence the provision authorizing the alter-
23 ation and amendment of the Special Charter by the legislature had been repealed and such power did not exist. This proposition advanced by defendant in error is in direct conflict with the adjudication and holding of the Supreme Court of Minnesota in this case and others. The same proposition was advanced by counsel upon the trial of the case in the State Court, but was disregarded by that court.

In conclusion I beg to call attention to the fact that each and every proposition submitted by counsel for defendant in error has been discussed and authorities cited
24 thereon in the brief filed by plaintiffs in error upon the motion to dismiss the writ of error and affirm the judgment. Underlying the whole case and the technical questions of law which have been presented for the consideration of this court, lies the great and controlling proposition that the equities are wholly with the plaintiffs in error. A State, like an individual, is bound, both legally and morally, to the fulfillment of its contracts. That the stockholders in each of the constituent corporations were exempt from personal liability for corporate debts is a conceded fact. That the adoption of the constitutional provision did not, of
25 itself, change the rule or impose upon them such personal liability, is conceded by the Supreme Court of Minnesota in this case. The consolidation agreement, the execution of which is claimed by the defendant in error to have created a new corporation subjected to new, different and more burdensome liabilities, was made only upon the solemn assurance of the State that no existing franchises, privileges, immunities or exemptions possessed by any one of the constituent companies should be lost by reason thereof. The enforcement of the judgment of the Supreme

Court of the State of Minnesota results in the most fla-
26 grant violation of our contract with the State An adjudication by this court affirming that decision would be an approval of a breach of contract. Briefly stated, plaintiffs in error pray that the State of Minnesota, in common with other persons, shall be compelled to act in good faith and fulfill its agreements; while defendant in error comes into court asking the State to repudiate its contract, after it has been accepted and acted upon in good faith.

Respectfully submitted,

ALBERT E. CLARKE,

Attorney for Plaintiffs in Error.

No. 160

FILED
FEB 8 1899
JAMES H. McKENNEY,
Clerk.

Brief of Cutcheon for D. E. (Gnds.)

SUPREME COURT OF THE UNITED STATES.

October Term, 1898.

Term No. 607.

Filed Feb. 3, 1899.

MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY, ET AL., PLAINTIFFS IN ERROR,

vs.

HENRY A. GARDNER, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

Motion Papers and Brief for Defendant in Error on Motion to Dismiss or Affirm.

F. W. M. CUTCHEON,
Counsel for Defendant in Error.

1 # SUPREME COURT OF THE UNITED STATES,

October Term, 1898.

Term No. 607.

MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY, ET AL., PLAINTIFFS IN ERROR,

vs.

HENRY A. GARDNER, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

NOTICE OF MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM.

To A. E. Clarke, Esq., Counsel for Plaintiffs in Error above named, Minneapolis, Minn.

Sir:—You will please take notice that the defendant in error above named will upon Monday, the 27th day of February, 1899, at the opening of court on said day, or as soon thereafter as counsel can be heard, move the Supreme Court of the United States at the court-room of said Supreme Court in the Capitol in the City of
2 Washington, D. C., to dismiss the writ of error to the Supreme Court of the State of Minnesota heretofore and on or about the 21st day of October, 1898, sued out of said Supreme Court of the United States by said plaintiffs in error above named, and for such other and further order or relief as to the court may seem just.

Further take notice that said motion will be based upon the ground that said Supreme Court of the United States has no jurisdiction of said cause above entitled, because:

1. This cause does not involve a Federal question; that is to say, there has not been drawn into question in this cause the validity of any treaty or statute of, or any authority exercised under, the United States, the decision whereon has been against the validity thereof. Nor has there been drawn into question in this cause the validity of any statute of, or any authority exercised under, any state on the ground that such statute or authority is repugnant to the Constitution, treaties or laws of the United States, the decision

whereon has been in favor of the validity thereof. Nor, has any claim been made in this cause of or to any title, right, privilege or immunity under the Constitution, or any treaty or statute of,
3 or commission held or authority exercised under the United States, the decision whereon was against the title, right, privilege or immunity so set up or claimed.

2. If any Federal question was involved in this cause when the same was pending in the Supreme Court of Minnesota upon appeal, whatever the decision of that court thereon (if any) may have been, another question, not Federal, was also involved and decided adversely to the plaintiffs in error, and the decision of this latter question is sufficient to sustain the judgment of that court irrespective of what its decision (if any) may have been upon such Federal question.

Further take notice that at the same time and place, said defendant in error will move said Supreme Court of the United States to affirm the judgment heretofore entered in said cause by said Supreme Court of the State of Minnesota, to review which said writ of error has been sued out as aforesaid, and for such other and further order or relief as to said Supreme Court of the United States may seem just.

Further take notice that said motion to affirm will be based
4 upon the ground that although the record may show that said Supreme Court of the United States has jurisdiction, it is manifest that the question on which such jurisdiction depends is so frivolous as not to need further argument.

Further take notice that said motions will be made upon all the records, files and papers of said cause above entitled on file in said Supreme Court of the United States, which will be referred to in support thereof.

St. Paul, January 31st, 1899.

F. W. M. CUTCHEON,
Counsel for Defendant in Error.

5 SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

Term No. 607.

MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, ET AL., Plaintiffs in Error,

vs.

HENRY A. GARDNER, Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

Motion to Dismiss Writ of Error or to Affirm.

Now comes Henry A. Gardner, defendant in error above named, through his undersigned counsel, and moves the court to dismiss the writ of error to the Supreme Court of Minnesota heretofore, to-wit, on or about the 21st day of October, 1898, sued out in this cause, or in case said writ shall not be dismissed, to affirm the judgment heretofore entered in said cause by said Supreme Court of the State of Minnesota, and for such other and further order or relief as to the court may seem just.

6 *Specification of Grounds of Motion.*

The motion to dismiss the writ of error, made above, is based upon the ground that this court has no jurisdiction to review the judgment of the Supreme Court of Minnesota heretofore entered in this cause, because:

1. This cause does not involve a Federal question; that is to say, there has not been drawn into question in this cause the validity of any treaty or statute of, or any authority exercised under, the United States, the decision whereon has been against the validity thereof. Nor has there been drawn into question in this cause the validity of any statute of, or any authority exercised under, any state on the ground that such statute or authority is repugnant to the Constitution, treaties or laws of the United States, the decision whereon has been in favor of the validity thereof. Nor has any claim been made in this cause of or to any title, right, privilege or immunity under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, the decision whereon was against the title, right, privilege or immunity so set up or claimed.

2. If any Federal question was involved in this cause when
7 the same was pending in the Supreme Court of Minnesota upon appeal, whatever the decision of that court thereon (if any) may have been, another question, not Federal, was also involved and decided adversely to the plaintiffs in error, and the decision of this latter question is sufficient to sustain the judgment of that court irrespective of what its decision (if any) may have been upon such Federal question.

The motion to affirm, made above, is based upon the ground that although the record may show that this court has jurisdiction, it is manifest that the question on which the jurisdiction depends is so frivolous as not to need further argument.

Statement of the Case.

The following are the facts in this case that are material to the questions here presented:

The Minnesota Western Railroad Company was incorporated with the powers usually conferred upon railroad companies, by an act of the legislature of the Territory of Minnesota, approved March 3d, 1853, (*Record, fol. 157;* Laws Minn. 1853, Ch. 10). The
8 act contained no provision whatever with reference to the liability of the shareholders of the company, and no general law upon the subject then existed. The act did include a provision that "the legislature may at any time amend or alter this act."

In 1858, the State of Minnesota was admitted to the Union under substantially its present constitution, which contained the following provision:

"Each shareholder in any corporation shall be liable to the amount of stock held or owned by him." (*Constitution Minnesota, Art. X., Sec. 3.*)

This provision (afterwards amended as stated below) has always remained part of the constitution of Minnesota, and has been construed by the Supreme Court of that State to impose an individual (double) liability upon shareholders, and to be self-executing. (See

Willis vs. Mabon, 48 Minn. 140.) In 1872, the provision was amended so as to read, "Each shareholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business), shall be liable to the amount of stock held or owned by him." But the exception thus inserted by amendment is not material to this case. (See *Opinion of*
9 *Supreme Court of Minnesota in this case, Record, fol. 186.*) This constitutional provision has remained in the form last quoted from the year 1872 to the present time.

Between 1853 and 1870, the charter of the Minnesota Western Railroad Company was twice amended in essential particulars. (See *Laws Minn. 1855, Ch. 65; Special Laws Minn. 1869, Ch. 117*), and by an act approved February 4, 1870, (*Special Laws Minnesota 1870, Ch. 57*), the company was completely re-constituted, and among other things, was authorized to change its name. It thereupon adopted the name "The Minneapolis and St. Louis Railway Company," and proceeded, for the first time, to survey and build several lines of railway, some of which were in operation prior to 1881. (*Record, fol. 160.*)

By an act approved March 2, 1881, (*Special Laws Minn. 1881, Ch. 113*), the Minnesota legislature, in addition to other powers thereby conferred, authorized the Minneapolis and St. Louis Railway Company and any other railway companies in the construction
10 of whose lines that company had aided, or whose lines were at the time held under lease by that company, to consolidate and form a *new consolidated* company. (See *Opinion of Supreme Court of Minnesota in this case, Record, fols. 184 to 186.*) The act contained various directions regulating the method of consolidation, the transfer of the constituent properties, the retirement of the stock of the old companies, the organization of the new company, and the issuance of the stock of the new company. It also contained the following provisions:

"Sec. 11. * * * Such new corporation shall possess all the powers, rights and franchises conferred upon each of the constituent corporations, *and shall be subject to all the restrictions and duties imposed by the laws of this state.*

"Sec. 12. Upon the consummation of said act of consolidation as aforesaid, all and singular, the rights, privileges, exemptions and franchises of each of said corporations previous to the same * * * shall be taken and deemed to be transferred to and vested in such new corporation without further act or deed * * * *
11 "Sec. 14. *All the provisions of the general laws of this state in regard to railroad corporations, shall be applicable to any new corporation formed by consolidation under the provisions of this act, except so far as the same shall not be applicable thereto by reason of the situation of portions of its line without this state*; provided, that nevertheless the privileges, franchises, exemptions and immunities hitherto *granted* to the Minneapolis and St. Louis Railway Company shall continue to and be vested in such new corporation, with the same effect as if originally granted thereto; * * * *"

Immediately subsequent to the passage of this act, the Minneapolis and St. Louis Railway Company, the Minneapolis and Duluth Railroad Company, the Minnesota and Iowa Southern Railway

Company, and the Fort Dodge and Fort Ridgely Railroad Company, (the first two being Minnesota corporations, and the last two being Iowa corporations), consolidated under and in accordance with the provisions of the act last mentioned, adopting the name "Minneapolis and St. Louis Railway Company." (*Record, fols. 157 and 158 and 56.*) The new company acquired all of the property
12 of its constituent companies and assumed all of their liabilities. (*Record, fol. 158.*) The stock of the constituent companies was taken up and the stock of the consolidated company issued in exchange therefor. (*Record, fols. 159 and 57 to 61.*) From 1881 to 1888, the new company, which is the corporation plaintiff in error in the case at bar, carried on the business theretofore conducted by its constituent companies, as well as other business. (*Record, fols. 160 and 161.*)

The defendant in error in this case is a judgment creditor of the new consolidated company, and the individual plaintiffs in error are shareholders in that company, who owned their stock at the time the judgment of defendant in error was obtained (December, 1887), or thereafter and prior to the institution of this suit. (*Record, fols. 167 to 169 and 170 and 171.*)

This is an action brought by defendant in error against the consolidated company and its shareholders, to enforce the so-called double liability imposed by the Minnesota constitution upon
13 shareholders in corporations of the class to which the corporation plaintiff in error belongs. The defendant in error in his pleadings contended that the consolidated company is a corporation brought into existence and organized under and by virtue of the act of 1881 above mentioned (*Record, fols. 24 and 100*), and that its stockholders are therefore subject to the liability imposed by the constitution which was then and still is in force, and that if this contention is erroneous and the corporation should be held to have been created by the act of 1853, the shareholders are nevertheless liable under the constitution for debts created after its adoption, among which is the claim of the plaintiff. (It will not be necessary upon this hearing to examine this alternative contention.) The plaintiffs in error by their pleadings contended that the railroad company was created by the act of 1853; (that the act of 1881 did not authorize a new corporation, but merely amended the constitution of a corporation already existing); and that inasmuch as the corporation was created by the act of 1853 which was passed, and, as they
14 claim, accepted prior to the adoption of the state constitution, that instrument could not operate to alter the rights of the shareholders of the corporation as established by the charter act and general rules of law in force at the time of its passage, one of which, they insist, was immunity from all personal liability upon the stock of the company. (*Record, fols. 83 and 84.*) The case was tried upon an agreed statement of facts before the District Court of Hennepin County, Minnesota. (*Record, fols. 102 to 124.*) That court directed judgment, in accordance with a stipulation of submission (*Record, fols. 154 and 155*) in favor of defendant in error for the full amount of his claim (*Record, fols. 172 and 173*). A motion for a new trial was made and argument heard thereon by three of the judges of the same court, who denied the motion (*Record, fols. 174*

and 175). Thereafter, judgment was entered in accordance with the directions contained in the findings of the trial court, and an appeal was taken from that judgment by the plaintiffs in error to the Supreme Court of Minnesota (*Record, fols. 175 to 177*). By that court, the judgment entered below was affirmed (*Record, fols. 188 and 190*). That tribunal based its decision upon the following propositions: (1) the act of 1881 authorized the creation of a new corporation; (2) the consolidated company was, as a matter of
15 fact, brought into existence, in pursuance of the authority conferred by this act of 1881, by the voluntary action of its constituent companies and of its shareholders; (3) the stock of any corporation brought into existence at that time, and therefore of this company, is subject to the liability imposed by the state constitution, the provisions of which, by the terms of the act itself, entered into and qualified the act authorizing the creation of the corporation. (*Record, fols. 178 to 188.*)

The court expressly declined to pass upon any other constitutional question presented by the record (*Record, fol. 188*). The judgment entered by the Minnesota Supreme Court was merely one of affirmance and for costs. (*Record, fol. 190.*) It is to bring this judgment to the Supreme Court of the United States for review that this writ of error has been granted.

January 31, 1899.

F. W. M. CUTCHEON,
Counsel for Defendant in Error.

16 SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898,

Term No. 607.

MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, ET AL., Plaintiffs in Error,

vs.

HENRY A. GARDNER, Defendant in Error.

In Error to the Supreme Court of the State of Minnesota.

Brief for Defendant in Error.

The facts upon which these motions are founded are fully stated in the printed motion papers prefixed hereto. Therefore, it is not necessary to re-state them in this place.

Argument upon the Motion to Dismiss.

17 I.

At the very outset, we may eliminate from the discussion two questions which the plaintiffs in error have attempted to inject into the case by means of their second and third assignments of error and their fourth assignment, respectively. (*Record, fol. 16.*)

1. Plaintiffs in error assert, in substance, in their second and third assignments that Section 3, Article X, of the Minnesota Constitution, as construed by the Supreme Court of Minnesota and as applied to the facts of this case, conflicts with the Federal Constitu-

tion, in that it impairs the obligation of a contract contained in, and without due process of law deprives plaintiffs in error of property rights secured by, the Minnesota act of March 2, 1881.

Now, plaintiffs in error cannot raise in this court any Federal question that was not raised upon the record prior to judgment in the Supreme Court of Minnesota.

See *California Powder Works vs. Davis, 151 U. S. p. 393; Texas and Pacific Railroad Co. vs. Southern Pacific Co., 137 U. S. p. 48*, and cases cited.

18 An examination of the pleadings in this case and of the assignment of errors upon appeal to the Minnesota Supreme Court (*Record, fols. 12 to 14*), will demonstrate that the only attempt to raise a Federal question made by the plaintiffs in error in either the District Court or the Supreme Court of Minnesota, was this:

It was claimed that the Minnesota Western Railroad Company and the consolidated corporation are identical, being the same corporation under different names; that the charter act of the Minnesota Western Railroad Company passed in 1853, was and is the measure of the rights and liabilities of the shareholders in that company; that this act of 1853 constituted and still constitutes a contract between the State and the Minnesota Western Railroad Company and its shareholders (and, therefore, plaintiffs in error) to the effect that no double liability should ever be imposed upon these shareholders or their successors; that if Section 3, Article X, of the State constitution be held to have been intended to apply to the stockholders of the Minnesota Western Railroad Company, it must be held inoperative and void *pro tanto*, because if given such effect, it would impair the obligation of a contract protected by the guaranties of the Federal Constitution.*

19 That this was the only Federal question raised below is plain upon the face of the record. The answer of the individual defendants (plaintiffs in error) filed in the District Court, contains the following allegations: "That the said Minneapolis and St. Louis Railway Company was incorporated prior to the adoption or enactment of the constitutional provisions and statutes referred to. That said Minneapolis and St. Louis Railway was incorporated in the year 1853 under and pursuant to the provisions of Chapter 66 of the special laws enacted by the legislature of the Territory of Minnesota in the year 1853, under and by the name of the Minnesota Western Railroad Company, and which name was subsequently changed to the Minneapolis and St. Louis Railway Company, substantially as set forth in the first division of said complaint. That the liability of the stockholders of said Minneapolis and St. Louis Railway Company was fixed by said act of incorporation, and not otherwise; and that the constitutional provision and laws referred to in the complaint are not applicable to or binding upon these defendants in that behalf." (*Record, fols. 83 and 84*).

*Throughout this argument, in order to prevent the confusion that might otherwise arise on account of the identity in name of the constituent company and the consolidated company (both of which were called Minneapolis & St. Louis Railway Company), I shall speak of the corporation that was originally known as the Minnesota Western Railroad Company and after 1870 as the Minneapolis & St. Louis Railway Company, and was one of the companies that consolidated under the act of 1881, as the "Minnesota Western Railroad Company;" and shall speak of the the new corporation formed under the last mentioned act as the "Consolidated Company."

20 There is no other allegation in the pleadings of the plaintiffs in error which even by implication claims the benefit of any provision of the Constitution of the United States. In the assignment of errors, filed in the Minnesota Supreme Court, there are but three assignments by means of which any attempt is made to claim the protection of the Federal Constitution. They are as follows:

(1) "The court erred in holding that Section 3, Article X., of the State Constitution, if applied to the defendant railway company did not violate Section 10, Article I., of the Constitution of the United States, in that the provisions of said Section 3, Article X., impaired the obligation of the charter contract contained in said Chapter 66, laws of 1853, Territory of Minnesota. (*Assignment VII.; Record, fol. 12.*)

(2) "The court erred in holding that Section 3, Article X., of the State Constitution if applied to the defendant railway company is not in violation of the 14th Amendment of the Constitution of the United States, in that the State of Minnesota, by and through the provisions of said Section 3, Article X., assumed to impair and destroy rights theretofore vested in said defendants. (*Assignment VIII.; Record, fol. 13.*)

21 (3) "The court erred in holding that Section 3, Article X., of the State Constitution, if applied to the defendant railway company, is not in violation of the 14th Amendment to the Constitution of the United States in that the State of Minnesota, by and through the provision of said Section 3, Article X., assumes to abridge the privileges and immunities of the defendants as citizens and to deny to defendants the equal protection of the laws, and to deprive them of their property without due compensation or due process of law." (*Assignment IX.; Record, fol. 13.*)

Now, it will be noted that Assignment VII. expressly refers to the contract contained in the act of 1853 and to no other contract. The defendants (plaintiffs in error) planted themselves in the court below upon the proposition that their rights were secured and defined by the act of 1853, and that these rights could not be affected by a subsequently passed constitutional enactment. It is evident that Assignment VIII. and Assignment IX. are but repetitions of the same claim invoking the protection of the 14th Amendment of

22 the Federal Constitution. The rights referred to in Assignment VIII. are the rights "theretofore vested in said defendants;" that is to say, prior to the adoption of the State Constitution, and it is evident that the privileges and immunities referred to in Assignment IX., and the property referred to in the same assignment, are the privileges, immunities and property rights claimed by the defendant under the act of 1853. It is manifest, therefore, that no claim under the act of 1881 as an independent contract was ever made in the State Courts and, therefore, that a decision thereon adverse to plaintiffs in error cannot have been rendered. It follows that *this* claim cannot now operate to confer jurisdiction upon this court.

2. Error committed by the state court in the construction of a statute of the state cannot in and of itself confer jurisdiction upon this court. The citation of authorities to this proposition is certainly wholly unnecessary. Therefore, it is manifest that nothing contained in the fourth assignment of plaintiffs in error suggests a ground of jurisdiction.

23 II.

The ground thus having been cleared, we have left to consider the claim that actually *was* made by the plaintiffs in error in the courts below and the question whether in view of that claim and the decision of the Supreme Court of Minnesota there is any Federal question in the case.

First, then, just what was the claim made below by the plaintiffs in error, and how was it made?

The claim is distinctly formulated in their answer and is the only claim upon this branch of the case ever made in either of the lower courts. (See quotation *supra*, and *Record, fols. 83 and 84.*)

The defendant in error was asserting against these individual plaintiffs in error the right to recover from them certain amounts of money which he alleged they, as stockholders in the Consolidated Corporation, had become liable to pay under and in accordance with the provisions of Section 3, Article X. of the Minnesota Constitution.

The plaintiffs in error in answer set up:

24 (1) That by a contract made in 1853 between the State of Minnesota and the Minnesota Western Railroad Company, the shareholders of that company were granted perpetual immunity from all such liability and that the provision of the Minnesota constitution above mentioned, if applicable to the Minnesota Western Railroad Company, is void, so far as it purports to affect the shareholders of the Minnesota Western Railroad Company, being a law of a state impairing the obligation of this contract. (It is unnecessary to refer to the claim made under the Fourteenth Amendment to the Federal Constitution, as that amendment had not been adopted in 1858 when the Minnesota constitution became effective);

(2) That the Consolidated Corporation in which the plaintiffs in error are admittedly shareholders, is the Minnesota Western Railroad Company under another name.

Therefore, that the individual plaintiffs in error, as such shareholders, are exempt from all individual liability for the claim asserted by defendant in error.

The truth of each premise of the foregoing syllogism was
25 denied by defendant in error.

Now, if the Supreme Court of Minnesota had determined the Consolidated Company to be identical with Minnesota Western Railroad Company, it would have been obliged to pass upon the first proposition advanced by the plaintiffs in error (the major premise in the syllogism above stated) and, if in passing upon that proposition, the court had determined either that the act of 1853 did not contain an exemption such as was claimed by plaintiffs in error, or if admitting the existence of the exemption, it had held that nevertheless they were liable for debts contracted after the adoption of the Minnesota Constitution, it is plain that the record would have disclosed a Federal question and that this court would have possessed jurisdiction.

But the Supreme Court of Minnesota did nothing, whatever, of this sort. It did not in any way construe the act of 1853. It did not attempt to decide what rights or immunities that act secured to the Minnesota Western Railroad Company or its shareholders. It did not decide in any way, even by the remotest inference, whether

under the terms of the constitution of Minnesota, shareholders of the Minnesota Western Railroad Company were made liable personally for its debts, nor did it attempt to decide whether, if
26 Section 3, Article X. of the Minnesota Constitution by its terms applied to shareholders in the Minnesota Western Railroad Company, the provisions thereof as so applied, were or were not valid under the Federal Constitution. Upon the contrary. the court expressly repudiated any intention to decide any of these questions. At one point in its decision, it says: "Whatever may be the liability of the several (constituent) corporations we need not inquire, because the liability here sought to be enforced is one against individuals who have been and are stockholders in the new corporation." (*Record, fols. 185 and 186.*)

And again: "Other questions have been raised and discussed by the respective counsel, but a decision upon them by this court in this action is entirely unnecessary, and we express no opinion thereon." (*Record, fol. 188.*)

27 See also the *syllabus* (*Record, fol. 178*) which in Minnesota is required to be prepared by the court itself. (*G. S. Minn. 1894, § 4826.*)

In other words, the fact is that while the plaintiffs in error have drawn in question the validity of a provision of the State Constitution upon the ground of its being repugnant to the Constitution of the United States, no decision in favor of the validity of the State Constitution has been made, for the State Court did not reach the question whether the State Constitution applies to the shareholders of the Minnesota Western Railroad Company, much less the ulterior question whether if it so applies, it is repugnant to the Federal Constitution.

In the language of this court in *Israel vs. Arthur, 152 U. S. p. 361.* "It is not sufficient for the maintenance of our jurisdiction to review the judgments of State courts, that a right, title, privilege or immunity under the Constitution of the United States may have been claimed, but such right, title, privilege or immunity must have been denied."

See also *Eustis vs Bolles, 150 U. S. 361, p. 366.*

From this alone, it seems plain that this court possesses no jurisdiction to review this case.

III.

28 But we may go farther, for it does affirmatively appear that this cause was decided in the State court upon a ground not involving a Federal question, and that the decision thereon is sufficient to support the judgment rendered and would be sufficient even if the Federal question which the plaintiffs in error attempted to raise below had in fact been decided adversely to them.

What the Supreme Court of Minnesota did was to decide that the proposition constituting the minor premise of the syllogism upon which plaintiffs in error relied was untrue; that is to say, it decided that the Consolidated Corporation, in which the individual plaintiffs in error were admittedly shareholders, was not the Minnesota Western Railroad Company, or to put it still another way, that the con-

tract pleaded by the plaintiffs in error had been made not with the Consolidated Corporation, but with somebody else.

This question, whether the Consolidated Corporation and the
29 Minnesota Western Railroad Company are identical or distinct, was clearly at issue. It was put at issue by the pleadings (*Complaint, Record, fol. 24; Answer, Record, fols. 83 and 84; Reply, Record, fol. 100.*) A large share of the proof introduced upon the trial was directed to this point. So also was a very large share of the argument addressed to the Supreme Court of Minnesota. By uncontested evidence, it appeared that the old Minneapolis and St. Louis Railway Company (Minnesota Western Railroad Company) and other corporations had voluntarily organized as a consolidated corporation under the act of 1881, and it was conceded upon both sides that if the corporation so formed was in fact a new and distinct corporation, a personal liability attached to its stock under the State Constitution. The ultimate question to be decided was a question of fact, but the proof of the facts that bore upon it being undisputed, the conclusion depended upon the construction to be given to the act of 1881, under the authority of which the Consolidated Corporation had been organized. The Minnesota court construed this
30 statute, and having determined its meaning and thus the significance and effect of the organization of the Consolidated Company, determined as a fact that the new company and the old company are two distinct, separate corporate entities. (*Record, fols. 178, 184 and 185.*)

This court has no jurisdiction to review this finding of fact.

Dower vs. Richards, 151 U. S. 658, p. 666.

Nor does the circumstance that the Supreme Court in arriving at its conclusion was obliged to construe the statute of 1881 alter the situation. It was not contended below that that statute contained any part of the contract that plaintiffs in error had set up. Its meaning was material only in this, that by one side it was claimed that any consolidated company formed under its authority constituted a new corporation, and by the other side, that such consolidated company constituted a mere reorganization of the old company. Not only does the record bear out this assertion, but it is evident that there was no color of reason to claim that a contract made in 1881 had been impaired by a provision of a constitution adopted in 1858.

See *Lehigh Water Co. vs. Easton, 121 U. S. 388.*

31 Such being the case, this court has no jurisdiction to review the action of the State Court in construing the act in question. Upon the contrary, as has numberless times been said in the decisions of this tribunal, "the constructions given by the courts of the states to state legislation and to state constitutions are conclusive upon this court, with a single exception, and that is when it is called upon to interpret the contracts of states, 'though they have been made in the forms of law.'"

Jefferson Branch Bank vs. Skelly, 1 Black. 436, p. 443.

See also:

St. P. M. & M. Ry. Co. vs. Todd Co., 142 U. S. 282;
New Orleans vs. New Orleans Waterworks, 142 U. S. 79;
Millers Ex'rs. vs. Swann, 150 U. S. 132;
Eustis vs. Bolles, 150 U. S. 361, and cases cited.

The Supreme Court of Minnesota next went on to determine the application of Section 3, Article X. of the State Constitution and held that it was applicable to all shareholders in all corporations
32 (with certain immaterial exceptions), organized after the adoption of the constitution, and therefore to the Consolidated Company. (*Record, fols. 186 and 187.*)

To review this action of the State Court, this court has no jurisdiction.

See cases cited last *supra*, and

C. M. & St. P. Ry. Co. vs. Minnesota, 134 U. S. 418, p. 456.

The state court further held, at least by necessary implication, that the individual plaintiffs in error had, by taking their stock in and accepting the benefits of the consolidated corporation, voluntarily assumed the obligations attaching thereto under the Minnesota laws. (*Record, fols. 178, 185 and 186.*)

33 It also held that the constituent companies by taking advantage of the act of 1881, had waived such privileges and immunities as were granted by their original charters respectively but were not or could not be conferred upon, the new company. (*Record, fol. 186.*) This also was a decision upon a question of local law and not subject to review here. A decision of this question, however, was doubtless unnecessary, for it affirmatively appears that each of the individual plaintiffs in error acquired his stock in the consolidated company long after its organization. (*Record, fol. 171.*)

In fine, the effect of the decision of the Minnesota court, so far as it touched the claim made by the plaintiffs in error in that court, and which we are now considering, was simply that the Consolidated Company is not the same company that was organized under the act of 1853.

It seems plain that the decision of that court went off upon
34 a point that did not involve any Federal question. That its decision upon that point is sufficient to sustain its judgment requires no demonstration.

Such being the case, this court, as has been decided in many cases, will not entertain jurisdiction.

Klinger vs. Missouri, 13 Wall. 257, p. 263;
Johnson vs. Risk, 137 U. S. 300;
Eustis vs. Bolles, 150 U. S. 361, pp. 366 and 367;
Missouri Pac. Ry. Co. vs. Fitzgerald, 160 U. S. 556, p. 576.

This case, indeed, it would seem ought to be controlled by the decision of this court in *Eustis vs. Bolles, supra.* The essential facts appearing in that case were these: Eustis was a creditor of Bolles & Wilde, residents of Massachusetts. His claim accrued in 1880, when the subject of insolvency proceedings in that state was controlled by the provisions of its Public Statutes. Under these provisions, an insolvent debtor was required to surrender all his property, not exempt, to his assignee, and was entitled to a discharge if he paid 50 per cent of the debts proved, or if he paid less upon
35 procuring within six months the written consent of a majority in number and value of his creditors. In 1884 and 1885 were passed the "Composition Statutes," under which the insolvent may file a written proposal for composition, setting forth the amount he offers to his creditors. If he offers an amount equal to or exceeding 50 per

cent of the amount of his debts, he may obtain a complete discharge upon the written assent of a majority of his creditors in number and amount. If he offers less, three fourths in number and amount must assent. In either case, the discharge is complete and the debtor retains his property. Bolles & Wilde, having become insolvents, in 1887 obtained discharges under these "Composition Statutes," against the protest of Eustis who insisted that the statutes were unconstitutional and void as to his debts. He accepted his share in the distribution, however. Afterwards Eustis sued Bolles & Wilde for the unpaid balance of his claim. The Supreme Court of Massachusetts *assumed* that the "Composition Statutes" as to
36 antecedent creditors were unconstitutional. But, construing them, held that they were not absolutely *void* even as to them; that an antecedent creditor might waive his right to object to their invalidity as to his debt; and that under these statutes an offer of composition was an offer of a certain payment upon each debt in consideration of a full discharge therefrom. It therefore decided that by accepting the benefits of the composition, Eustis had estopped himself to insist upon the validity of the "Composition Statutes" as to his debt. (See *Eustis vs. Bolles, 146 Mass. pp. 414 to 417.*)

This court, upon considering the case, held that the Massachusetts court had decided the case upon questions of fact and local law, and that its decision upon these questions was sufficient to sustain its judgment, and that therefore this court had no jurisdiction over the case.

The close parallelism between that case and the case at bar is too evident to require commentary.

See also *Beaupre vs. Noyes, 138 U. S. 397.*

37 But it will be said (although this claim was not made in the State courts) that not only was the immunity claimed by plaintiffs in error granted by the act of 1853 to the Minnesota Western Railroad Company, but it was transferred to and vested in the Consolidated Company by the act of 1881, and that Section 3, Article X. of the Minnesota Constitution, if held to apply to shareholders in the Consolidated Company, has the effect of depriving them of the immunity thus granted and transferred. This position was most ingenuously formulated by counsel for plaintiffs in error in their brief in support of the petition for the writ of error granted by this court. They say: "True, the original company accepted the amendment of 1881, but such acceptance was upon the condition embodied in the act itself that the new corporation should retain all the 'privileges, franchises, exemptions and immunities' granted to the original corporation * * * * The act referred to was accepted as an entirety. Although in violation of the State Constitution
38 which forbids the creation of corporations by special act, its acceptance was held to work an estoppel to assert its unconstitutionality. The acceptance brings its benefits as well as its burdens. Its burden is the creation of a new corporation. Its benefits are the perpetuation and continuance of existing privileges, exemptions and immunities * * * The power of the legislature to continue the original immunities is not questioned and must be

conceded. If denied, the defendants cannot be held to an acceptance of the act when deprived of the most valuable condition."

Now this contention assumes several propositions that are untrue or beside the point. The Supreme Court of Minnesota did not hold the act of 1881 unconstitutional, but, expressing no opinion upon that subject, held that the plaintiffs in error were in any case, estopped to attack the act. The question of the power of the legislature to *continue* the immunity in question, if granted by the act of 1853, was never in the case, but its power to *transfer* that immunity to another corporation formed after the adoption of the State Constitution was not only questioned—it was flatly denied. It was also denied that the act of 1881 even *purported* to transfer that immunity to the Consolidated Company.

And the Supreme Court of Minnesota held (and this is a complete answer to the position of plaintiffs in error that we are considering) that the act of 1881 did *not* have the effect of trans-
39 ferring to or vesting in the Consolidated Company the immunity claimed. Its decision upon this point, as we have shown, is conclusive upon this court.

Even if the Supreme Court of Minnesota had held expressly (and it did not) that the act of 1881 *purported* to transfer this immunity to the Consolidated Company, but that it was ineffective to do this because of the co-existence of the paramount provisions of the State Constitution, such decision would not have given rise to a Federal question. This would have amounted merely to a construction of the act in connection with Section 3, Article X., of the State Constitution.

The question whether the plaintiffs in error should be held estopped, upon the facts of the case, to assert the unconstitutionality of an act of the Minnesota legislature, as tested by the provisions of the State Constitution, if they at the same time be denied some of the privileges the act purported to confer, is one of local law that was properly argued to, and was denied by, the State Court, but with which this court has no concern.

See *Eustis vs. Bolles, supra*, which is squarely in point.

40 The claim of plaintiffs in error that we are discussing simply resolves itself, when analyzed, into a claim that the obligation of a contract, to the benefits of which they assert they are entitled, has been impaired by means of an erroneous construction placed upon an independent enactment (the act of 1881) by the State courts. But even if this claim were sound, it would not make a case within the jurisdiction of this court. The power delegated to the Supreme Court of the United States is for the restraint of unconstitutional legislation by the states, and not for the correction of alleged errors committed by their judiciary. (See *Commercial Bank vs. Buckingham's Executors, 5 Howard 317, pp. 342 and 343.*)

"In order to come within the provision of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired,—it must have been impaired by a law of the state. The prohibition is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of

administrative or executive boards or officers, or the doings of corporations or individuals."

See also *Railroad vs. Rock, 4 Wall. 181;*
Knox vs. Bank, 12 Wall. 379;
Railway Co. vs. Todd Co., 142 U. S. 282.

42 Finally, if it be claimed that a Federal question has arisen by reason of the denial by the State Court of the claim of plaintiffs in error that the act of 1881 effected a transfer to the Consolidated Company of the immunities, if any, theretofore vested in the Minnesota Western Railroad Company (old Minneapolis and St. Louis Railway Company), such contention must be based upon the theory that the act of 1881 constitutes a contract to that effect protected by the Federal Constitution and impaired by Section 3, Article X. of the State Constitution. As we have seen, no such claim was made in the court below. But if it had been, it could not furnish ground for the jurisdiction of this court; for it is not enough that plaintiffs in error claim a contract. The record, *prima facie*, must show the existence of a contract and of some *subsequent* state law which is at least claimed to impair the validity of the contract.

New Orleans vs. N. O. Water Works, 142 U. S. 79, pp. 87 and 88;
Lehigh Water Co. vs. Easton, 121 U. S. 388, pp. 391 and 392.

43 But it affirmatively appears on the face of this record that the law which is claimed to impair the obligation of the contract, now said to be contained in the act of 1881, was enacted in 1858.

I respectfully submit that it affirmatively appears that this court has no jurisdiction of this cause, and that the writ of error should be dismissed.

Upon the Motion to Affirm.

If the court should be of the opinion that technically there is a Federal question in the case, and that strictly speaking the court has jurisdiction, then I submit that the question upon which such jurisdiction depends is so frivolous as to require no argument beyond what has already been submitted upon the motion to dismiss.

44 So far as I am able to discover, the only question that is even colorably Federal is that raised by the claim, not raised below, that the act of 1881 constitutes a contract transferring to and vesting in the Consolidated Company the immunity, if any, theretofore vested in the old company and that the obligation of this contract has been impaired by Section 3, Article X. of the Minnesota Constitution. If this claim does raise a Federal question, it can hardly be said, in view of the relative dates of the two enactments, to be one that is entitled to serious consideration.

And see for a case generally and closely analogous to this,
Shields vs. Ohio, 95 U. S. 319.

I respectfully submit that the writ should be dismissed or that the judgment of the Supreme Court of Minnesota should be affirmed.

F. W. M. CUTCHEON,
Counsel for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 160.

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY *et al.*,

Plaintiffs in Error,

vs.

HENRY A. GARDNER,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR DEFENDANT IN ERROR.

Statement of Facts.

The Minnesota Western Railroad Company was incorporated by an act of the legislature of the Territory of Minnesota, approved March 3rd, 1853, entitled "*An act to incorporate the Minnesota Western Railroad Company*" (*Laws Minn. 1853, Chap. 66*). By this act Robert J. Walker and others were created a body corporate with the usual powers of private corporations, and were authorized to construct a railroad from some convenient point on Lake St. Croix or the St. Croix River to St. Paul and St. Anthony, and thence across the Mississippi River to the western boundary of the territory, with branches to the Red River and to the St. Louis River, if

deemed advisable. The act contained various immaterial provisions with reference to the organization and management of the company.

Unless by Section 20, which required the company to complete its road from the St. Croix to St. Paul within six years from the passage of the act, no duty was imposed either upon the company or its shareholders. Section 22 read as follows: "The legislature may at any time amend or alter this act." The act contained no provisions whatever with reference to the liability of shareholders (*See copy of Act at end Brief of Plaintiffs in Error on Motion to Dismiss or Affirm.*)

The Company thus incorporated took no steps toward the construction or operation of a railroad prior to the summer of 1870 (*Record, fol. 160*). In the meantime its constitution was several times altered in important particulars.

By an act approved February 26th, 1855, entitled "*A bill to amend an act entitled 'An act to incorporate the Minnesota Western Railroad Company'*" (*Laws Minn. 1855, Ch. 65*), the original act of incorporation was amended. To the names of the original corporators were added those of a number of other persons.

The eastern terminus of the road was fixed at Stillwater. The provision requiring the line from the St. Croix to St. Paul to be completed within six years was stricken out. The company, as thus reconstituted, was required to complete its road from Stillwater to St. Anthony within six years from the passage of this amendatory act.

In 1858 the State of Minnesota was admitted into the Union under its present constitution, which contained the following provision (*Art. 10, Sec. 3*), viz.:

"Each stockholder in any corporation shall be liable to the amount of stock held or owned by him."*

*This provision was amended in 1872 so as to read: "Each shareholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business), shall be liable to the amount of stock held or owned by him." The provision, as thus amended, remains a part of the constitution of the State.

A law providing a remedy to enforce the provision was already in existence in 1858 (*See Statutes Minnesota 1851, Chapter 77, Sections 6, 7, 1½ to 26*), and continued in force, after the admission of the Territory of Minnesota into the Union, until 1866, when it was re-enacted in a somewhat amended form by the State Legislature (*See Revised Statutes of Minnesota 1866, Chapter 76*) This statute has continued to exist in substantially the form in which it appeared in the revision of 1866 from the date of the adoption of that revision to the present time. This proceeding was instituted in accordance therewith (*See General Statutes Minnesota 1894, Chapter 76*).

By an act of the State Legislature approved March 5th, 1869, and entitled "*An act to amend an act entitled 'An act to incorporate the Minnesota Western Railroad Company', passed March third, one thousand eight hundred and fifty-three*" (*Special Laws Minn., 1869, Ch. 117*), the original act of incorporation of the Minnesota Western Railroad Company was amended so as to define the route of the proposed railway as follows: from Stillwater to St. Anthony; thence across the Mississippi River and via the city of Minneapolis, to a convenient point of junction with the Minnesota Valley Railroad or the Hastings & Dakota Railroad, or both, with a branch to the Red River, via Kandiyohi, and also to a point to be selected on the St. Louis River, if deemed desirable. Section 4 of the original act of incorporation was amended by designating Franklin Steele and others as the persons authorized to open books for receiving subscriptions to the capital stock and to prescribe a form of subscription. These persons were among those whose names had been added to the list of corporators by the act of 1855. This amendatory Act of 1869 included the following (*Section 3*): "That whenever the word 'Territory' occurs in said act [the original act of incorporation], except in Section one, the same be stricken out and the word 'State' inserted in lieu thereof." In Section One, proper, the word "territory" did not occur, but, of course, did occur in the enacting clause, which introduces that section. Section 4 of the Act of 1855, which required the construction of the road from Stillwater to St. Anthony by February 26th, 1861, was repealed. The names of F. R. Delano and others were added to the list of corporators, and the Minnesota Western Railroad Company, as thus again reconstituted, was required to *commence* the construction of its road within three years from the passage of the act; that is to say, by March 5th, 1872 (*See copy of Act reprinted as "Appendix A."*)

On February 4th, 1870, the Legislature passed an act entitled "*An act to amend an act entitled 'An act to incorporate the Minnesota Western Railroad Company, approved March third, one thousand eight hundred and fifty-three', and the acts amendatory thereof*" (*Special Laws, Minn., 1870, Ch. 57*). By this act authority was given to construct a branch line from the point of junction with the Minnesota Valley or the Hastings & Dakota Railroad to the north line of the State of

Iowa. That part of the Act of 1869 authorizing Franklin Steele and his associates to control the matter of stock subscriptions was repealed. The company was authorized to increase the number of its directors to twenty-five. An elaborate provision prescribed the manner in which the company should acquire its right of way. By Section 5 of this Act of 1870 the company was authorized to change its name by resolution of its Board of Directors. It was also authorized to issue preferred and special stock. Provisions were incorporated requiring the payment of a gross earnings tax, and exempting the road from other forms of taxation. This act also repealed Section 22 of the original Act of 1853, by which the legislature reserved the right to amend or alter the act of incorporation (*See copy of Act reprinted as "Appendix B"*).

Shortly after the passage of the Act of 1870 the Railroad Company changed its name to "Minneapolis and St. Louis Railway Company," and thereupon began the prosecution of its enterprise by the survey and location upon the ground of certain of the lines afterwards constructed by it. Prior to 1881 it had constructed and had begun to operate a number of lines of railway.

During the regular session of 1881, the legislature passed an act entitled "*An act to amend an act entitled 'an act to amend an act entitled an act to incorporate the Minnesota Western Railroad Company, approved March third (3rd), one thousand eight hundred and fifty three,' and the acts amendatory thereof, approved February fourth (4th) eighteen hundred and seventy (1870),*" which act was approved March 2nd, 1881. (*S. L., Minn., 1881, Ch. 113.*)

This act contained three distinct grants of power:

(1) The then existing Minneapolis & St. Louis Railway Company was authorized to make or acquire from time to time any extension of any line of railway then owned or operated by it, or thereafter constructed and operated by it, into the states of Iowa, Missouri, Kansas, Nebraska and Wisconsin, and into the territory of Dakota, or into one or more of the same, provided that authority should first be obtained from any state or territory into which its lines should be extended, to make or acquire and maintain such extensions.

(2) Authority was also granted to acquire, from time to

time, by lease, purchase, exchange of stock or otherwise, any railroad or railroads whose lines connected with its own, as they then existed, or should connect with them as they might thereafter be extended, either directly or by means of intervening lines. It was provided that such acquisition should be made upon terms agreeed upon by a contract in writing between the respective corporations, approved by two-thirds in amount of the stockholders in each such corporation; that a copy of the contract of purchase, together with evidence of the consent of shareholders, should be filed in the office of the Secretary of State.

(3) The act also provided that it should be lawful for the Minneapolis & St. Louis Railway Company to merge and consolidate its capital stock, franchises and property with the capital stock, franchises and property of any other railroad company or companies, in the construction of whose lines the Minneapolis & St. Louis Railway Company should have aided, or whose lines of railway were or should be at the time of such consolidation held under lease by the Minneapolis & St. Louis Railway Company; provided, that the lines of railway of the company or companies so consolidating should form a continuous line of railway with each other, and that no such consolidation should be made with any company owning or controlling a parallel or competing line. It was provided that the directors of the companies proposing to consolidate should enter into a separate agreement, under the corporate seal of each company, for the consolidation of such companies and railroads, such agreement to prescribe, (1), the terms and conditions of the consolidation and the mode of carrying the same into effect; (2), the name of the "new corporation," which, it was provided, might be that of any constituent corporation, or any other name; (3), the numbers, names and places of residence of the directors and other officers of the consolidated company for the first year; (4), the amount of the capital stock of the "new company," which, however, could not exceed $20,000,000 in amount; (5), the number of shares into which such capital stock should be divided (permission was given to divide the stock into classes with such preferences as might be agreed upon); (6), the amount of par value of each share; (7), the manner of converting or exchanging the capital

stock of each of the constituent companies into that of the "new corporation," and the terms of such conversion; (8), the manner of compensating those stockholders in any of the constituent companies who should decline to convert their stock into the stock of the "new corporation"; (9), how and when the directors and officers should be chosen; (10), such other details as should be deemed necessary to perfect such "new organization" and consolidation. Such agreement of the directors, the act required to be submitted to the shareholders of each of the constituent corporations separately at a meeting to be called upon at least thirty days' notice, and to be sanctioned by the stockholders of each such company by a vote of at least two-thirds in amount of the shareholders present or represented at such meeting, before it should become operative. It was also provided that such agreement, when sanctioned in the manner provided, should be deemed the agreement of the constituent companies. It was further provided that if any holder of stock in any of the corporations existing under the laws of the State of Minnesota, and so consolidating, should be dissatisfied with such consolidation and give notice of such dissatisfaction to the president, secretary or treasurer of his company within three months after the consent of his company to the consolidation, the "consolidated company" should pay to such dissatisfied shareholder the full actual value of his stock immediately prior to such consolidation. A method was also provided for the judicial determination of the value of the stock of such dissatisfied shareholder.

The sections of the act, not summarized above, read as follows (the italics are my own):

"SEC. 11. Upon the approval of such agreement and act of consolidation, as hereinbefore provided, and upon the filing of the same, or a copy thereof, in the office of the Secretary of State, the said corporations, parties thereto, shall be deemed and taken to be one (1) corporation by the name provided in the said agreement and act, and the stock of the *new corporation* issued under the terms of such agreement and act of consolidation in exchange for the stock of the *former companies*, shall be deemed and taken as lawful stock, and subject only to such further payments, calls or assessments, if any, as may be mentioned in the said consolidation agreement; and such *new corporation* shall possess all the powers, rights and franchises *conferred upon* each of its constituent corporations, *and shall*

be subject to all the restrictions and duties imposed by the laws of this State.

"SEC. 12. Upon the consummation of said act of consolidation as aforesaid, all and singular the rights, privileges, exemptions and franchises of each of said corporations, parties to the same, and all the property, real, personal and mixed, and all debts due on whatever account to either of said corporations, as well as all stock subscriptions and other things in action belonging to either of said corporations, shall be taken and deemed to be *transferred to* and vested in *such new corporation*, without further act or deed; and all claims, demands, property, rights of way, and every other interest shall be as effectually the property of the *new corporation* as they were of the *former corporations*, parties to said agreement and act; and the title to all real estate taken, by deed or otherwise, under the laws of this State, vested in either of said corporations, parties to said agreement and act, shall not be deemed to revert or be in any way impaired by reason of this act, or anything done by virtue thereof; but shall be vested in *the new corporation* by virtue of such act of consolidation.

"SEC. 13. The rights of all creditors of and all the holders of liens upon the property of either of said corporations, parties to said agreement and act, shall remain and be preserved, unimpaired, and *shall be assumed* and borne by the *new corporation*, and *the respective corporations shall be deemed to continue in existence so far as necessary to preserve the same*, and all debts and liabilities incurred by either of said corporations shall thenceforth attach to such *new corporation* and be enforced against it and its property to the same extent *as if said debts or liabilities had been originally incurred or contracted by it.* No suit or action or other proceeding now pending before any Court or tribunal, in which either of said railroad companies is a party, shall be deemed to have abated or been discontinued by the agreement and act of consolidation as aforesaid, but the same may be conducted in the name of the existing corporation to final judgment, or *such new corporation may be*, by order of the Court, on motion, *substituted as a party.* Suits may be brought and maintained against such *new corporation* for all causes of action in the same manner as against other railroad corporations in this State.

"SEC. 14. *All the provisions of the general laws of this state in regard to railroad corporations shall be applicable to any new corporation formed by consolidation under the provisions of this act*, except so far as the same shall not be applicable thereto by reason of the situation of portions of its line without this state; provided, that nevertheless the privileges, franchises, exemptions and immunities hitherto *granted*

to the Minneapolis and St. Louis Railway Company shall continue to and be vested in such *new corporation*, with the same effect as if originally granted thereto ; and that such *new corporation* may at any time hereafter be consolidated with any other railroad company or companies in the same manner and with the same effect as is by this act provided " (*See copy of Act at end of Brief of Plaintiffs in Error on Motion to Dismiss or Affirm*).

Immediately subsequently to the passage of this act, the Minneapolis & St. Louis Railway Company, the Minneapolis & Duluth Railroad Company, the Minnesota & Iowa Southern Railroad Company, and the Fort Dodge & Fort Ridgely Railroad Company (the first two being Minnesota corporations, and the last two Iowa corporations), consolidated under and in accordance with the provisions of the act last mentioned, as, and under the name of "The Minneapolis & St. Louis Railway Company" (*Record, fols. 157 & 158*).

This name differed from that of the constituent company first named (the original Minnesota Western Railroad Company) only in that the article "The" was incorporated in the name of the new company and was not contained in the name of the constituent company. *

The Consolidated Company, by the agreement of consolidation, acquired all the property, rights and franchises of its constituent companies, and became subject to all the obligations and liabilities of those companies. The stock of the consolidating companies was taken up by the Consolidated Company, and its stock issued in exchange therefor (*Record, fols. 57 to 60*). From 1881 to 1888 this Consolidated Company, which is the corporation plaintiff in error, carried on and extended the business theretofore conducted by its constituent companies (*Record, fols. 158 & 160*).

On the 28th day of June, 1888, Henry Seibert, trustee under the Consolidated Company's Improvement and Equipment Mortgage (a lien upon very much the largest part of the company's road) began foreclosure proceedings. A receiver in aid

* Throughout this argument, in order to prevent the confusion that might otherwise arise on account of the resemblance in name between the constituent company and the consolidated company, I shall speak of the corporation that was originally known as the Minnesota Western Railroad Company and after 1870 as Minneapolis & St. Louis Railway Company, and was one of the companies that consolidated under the act of 1881, as the "Minnesota Western Railroad Company ;" and shall speak of the new corporation formed under the last mentioned act as the "Consolidated Company."

of foreclosure was appointed and forthwith entered into possession of the whole road and all the property and interests of the company (*Record, fols. 163 & 164*). The company's property remained *in custodia legis* until November 2d, 1894, when everything upon which the mortgage foreclosed had been a lien, including everything upon which a levy could be made, having been sold for just enough to discharge the Improvement and Equipment Mortgage, accrued interest and costs, the whole road and all the property in the receiver's hands were transferred to the Minneapolis and St. Louis Railroad Company, the assignee of the purchaser (*Record, fols. 164 to 166*). The Consolidated Company is, and ever since November 2d, 1894, has been, admittedly, wholly insolvent (*Record, fol. 169*).

The defendant in error in this case is a judgment creditor of the Consolidated Company. The individual plaintiffs in error are shareholders in that company, who owned their stock at the time the judgment of defendant in error was obtained (December, 1887), or thereafter and prior to the institution of this suit (*Record, fols. 167 to 169, 170 and 171*). Each of them acquired all of his stock between November, 1884, and the date of the commencement of this suit. None of them was a shareholder in any of the companies that united to form the Consolidated Company (*Record, fols. 170 and 171*).

This is an action brought by defendant in error against the Consolidated Company and its shareholders, to enforce the so-called "double liability" imposed by the Minnesota constitution upon shareholders in corporations of the class to which the corporation plaintiff in error belongs. The defendant in error in his pleadings contended that the Consolidated Company is a corporation brought into existence and organized under and by virtue of the Act of 1881 above mentioned (*Record, fols. 24 and 100*), and that its stockholders are therefore subject to the liability imposed by the constitution which was then and still is in force, and that, if this contention is erroneous and the corporation should be held to have been created by the Act of 1853, the shareholders are nevertheless liable under the constitution for debts created after its adoption, among which is the claim of the defendant in error. The plaintiffs in error by their pleadings contended that the railroad company was created by the Act of 1853; that the Act of 1881 did not authorize a new cor-

poration, but merely amended the constitution of a corporation already existing; and that inasmuch as the corporation was created by the Act of 1853 which was passed and, as they claim, accepted prior to the adoption of the State Constitution, that instrument could not operate to alter the rights of the shareholders of the corporation as established by the charter act and general rules of law in force at the time of its passage, one of which, they insist, was immunity from all personal liability upon the stock of the company (*Record, fols. 83 and 84*). The case was tried upon an agreed statement of facts before the District Court of Hennepin County, Minnesota (*Record, fols. 102 to 124*). That court directed judgment, in accordance with a stipulation of submission (*Record, fols. 154 and 155*) in favor of defendant in error for the full amount of his claim (*Record, fols. 172 and 173*). A motion for a new trial was made and argument heard thereon by three of the judges of the same court, who denied the motion (*Record, fols. 174 and 175*). Thereafter, judgment was entered in accordance with the directions contained in the findings of the trial court, and an appeal was taken from that judgment by the plaintiffs in error to the Supreme Court of Minnesota (*Record, fols. 175 to 177*). By that court, the judgment entered below was affirmed (*Record, fols. 188 and 190*). That tribunal based its decision upon the following propositions: (1) the Act of 1881 authorized the creation of a new corporation; (2) the Consolidated Company was, as a matter of fact brought into existence, in pursuance of the authority conferred by this Act of 1881, by the voluntary action of its constituent companies and of its shareholders; (3) the stock of any railroad corporation brought into existence at that time, and therefore of this company, is subject to the liability imposed by the state constitution, the provisions of which entered into and qualified the act authorizing the creation of the corporation (*Record, fols. 178 to 188*).

The court expressly declined to pass upon any other constitutional question presented by the record (*Record, fol. 188*). The judgment entered by the Minnesota Supreme Court was merely one of affirmance and for costs (*Record, fol. 190*). It is to bring this judgment to the Supreme Court of the United States for review that this writ of error has been granted.

A motion to dismiss the writ or to affirm the judgment be-

low was made by defendant in error at the October, 1898, Term. After the submission of briefs thereon, an order was entered postponing further consideration thereof to the hearing on the merits.

General Propositions.

Defendant in error now contends:

(1.) That this court possesses no jurisdiction to review the judgment in this action rendered by the Supreme Court of Minnesota;

(2.) That the Consolidated Company is a corporation brought into existence under authority of the Act of 1881, and its shareholders are, therefore, subject to the liability imposed by Section 3, Article X, of the Constitution of Minnesota;

(3.) That even if the Consolidated Company should be held to be identical with the Minnesota Western Railway Company and to have been created by the Act of 1853, its shareholders are nevertheless liable under the State Constitution for debts contracted subsequently to the adoption of that instrument.

Argument.

THIS COURT DOES NOT POSSESS JURISDICTION TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF MINNESOTA.

I.

At the outset we may eliminate from the subjects for discussion the various claims that jurisdiction in this Court to review the decision of the Minnesota Supreme Court has arisen by reason of the action of the latter in construing the Act of 1881. This claim is presented in different forms in the SECOND,

THIRD and FOURTH ASSIGNMENTS OF ERRORS filed in this Court by plaintiffs in error (*Record, fol. 16*).

In their SECOND ASSIGNMENT, plaintiffs in error assert that the State of Minnesota, by means of the provisions of Section 3, Article X, of its Constitution, has attempted, in violation of the Fourteenth Amendment of the Federal Constitution, to deprive plaintiffs in error of rights vested in them by the Act of 1881.

I cannot discover that counsel for plaintiffs in error in his brief filed on the motion to dismiss or affirm has anywhere attempted an explanation of the claim contained in this assignment.

It cannot be, however, that the assignment is intended to set forth a claim that the provision of the Minnesota Constitution which became operative in 1858, of itself, destroys rights vested in plaintiffs in error by the Act of 1881, or in other words impairs the obligation of a contract contained in that act, for it has been decided too frequently to admit of such a contention, that only an act adopted subsequently to the making of the contract or the vesting of the rights asserted can furnish ground for such a claim.

> *Lehigh Water Co.* vs. *Easton, 121 U. S. 388 ;*
> *New Orleans Water Works Co.* vs. *La. Sugar Refining Co., 125 U. S., 18 ;*
> *Central Land Co.* vs. *Laidley, 159 U. S., 103, p. 109 ;*
> *Bacon* vs. *Texas, 163 U. S., 207, p. 216.*

It is not suggested that, since the passage of the Act of 1881, anything has been done by the State, through the agency of its legislative or its executive department, or of any ministerial officer or of any individual or corporation acting under its authority, that constitutes a taking of, or in any way affects, the right which is alleged to have been vested in plaintiffs in error by that act.

It is evident that the assignment is an attempt to characterize *the action of the State Courts in enforcing the constitutional provision in question*, as against the shareholders in the Consolidated Company, as a taking of the property of the plaintiffs in error without due process of law.

It is the action of the State Courts of which complaint is

made and the gravamen of the complaint must be that those Courts have erred in so construing the Act of 1881 that the provision of the State Constitution declaring an individual liability of shareholders is applicable to the shareholders in the corporation organized under the authority of that act.

In their THIRD ASSIGNMENT, plaintiffs in error assert, *expressly*, that *the enforcement* of Section 3, Article X, of the Minnesota Constitution is in violation of the Federal Constitution in that it impairs the obligation of a contract contained in the Act of 1881.

In this instance we are furnished an explanation of their claim which must apply as well to the same claim as stated in the SECOND ASSIGNMENT. Counsels for plaintiffs in error advance and reiterate the following propositions:

Whether the Act of 1881 merely authorized an amalgamation of the Minnesota Western Railroad Company and other companies, and continued in the amalgamated companies, under a different form of organization, the rights and immunities of the Minnesota Western Railroad Company (as is contended by plaintiffs in error), or authorized the creation, by agreement, of a *new* corporate entity and the transfer to it of rights and immunities theretofore possessed by the Minnesota Western Railroad Company (as is contended by defendant in error), the intention of the legislature, as it appears expressed in the Act, was that the new organization should have vested in it, whether by confirmation or by transfer, *all* of the immunities of the Minnesota Western Railroad Company, of which immunity of shareholders from individual liability was one (*Brief of Plaintiffs in Error on Motion to Dismiss or Affirm, pp. 13, 15 to 22 and 24*). The shareholders, plaintiffs in error, by acting upon the Act of 1881, crystalized it into a contract (*Brief of Plaintiffs in Error on Motion to Dismiss or Affirm, p. 22*). *By the enforcement* of the individual liability claimed to exist under its constitution, the State has impaired the obligation of this contract between the State and plaintiffs in error contained in the Act of 1881 (*Brief of Plaintiffs in Error on Motion to Dismiss or Affirm, pp. 8, 24 and 25*). This result, it is true, has occurred through the agency of the judiciary and by reason of an erroneous construction by the State Courts of the Act of 1881 (*Brief of Plaintiffs in*

Error on Motion to Dismiss or Affirm, p. 25). But the fact that it has occurred in this manner is immaterial. The jurisdiction of this Court to review the decision is as complete under these conditions as it could be under any (*Brief of Plaintiffs in Error on Motion to Dismiss or Affirm, p. 25*).

In their FOURTH ASSIGNMENT, plaintiffs in error assert simply that the State Court erred in holding that the consolidation agreement entered into under authority of the Act of 1881 created a new corporation.

Here the claim which is made by indirection in each of the other two assignments is set forth in all its baldness. It requires no explanation.

For two conclusive reasons, no claim of jurisdiction in this Court can be successfully founded upon the assertions contained in any one of these assignments.

1. It is not alleged by plaintiffs in error that the State through the agency of its legislative or its executive department or of any ministerial officer, or of any individual or corporation acting under its authority, has deprived plaintiffs in error of rights secured by the Act of 1881, or that by means of any law passed subsequently to the passage of that act the State has impaired the obligation of the contract contained in that act; but, in each case, the action complained of as a taking of property or as an impairment of contract obligation is the action of the State Courts in misconstruing (so they assert) the act alleged to confer the rights or constitute the contract claimed.

That such judicial action cannot constitute a ground of jurisdiction in this Court is too well settled to require argument or quotation from authorities.

See

Railway Company vs. Todd County, 142 U. S., 282;
Bank vs. Buckingham's Ex'rs., 5 How., 317, pp. 342 and 343;
Railroad Company vs. Rock, 4 Wall., 181;
Railroad Company vs. McClure, 10 Wall., 511;
Knox vs. Bank, 12 Wall., 379;
Turner vs. Wilkes Co. Comrs., 173 U. S., 461.

Nor can jurisdiction be founded upon the claim that the

Minnesota Supreme Court, in construing the Act of 1881, overruled or ignored prior decisions of its own to a contrary effect. The argument upon that point made by counsel for plaintiffs in error is substantially:

That the Minnesota Supreme Court held previously to 1881 (*First Division, &c., R. R. Co.*, vs. *Parcher, 14 Minn., 297, Gil. 224*) that neither (1) the transfer by legislative act of forfeited franchises theretofore possessed by one set of persons, and afterward acquired and held by the State without merger, to another set of persons who, under authority of the act providing for the transfer organized as a corporation, nor (2) the division of the franchises of an existing corporation between two sets of its shareholders, under authority contained in the original charter of the Company which antedated the State Constitution, with the result that two separate organizations existed where but one had existed theretofore (which transaction was subsequently ratified by legislative act), was violative of the prohibition of incorporations by special act contained in the State Constitution; that the effect of this was to hold that the organization of a new corporate entity and the transfer to it of the franchises of an existing company does not amount to the creation of a new corporation; that this holding had in 1881 become a rule of property; that the organization of the Consolidated Company was perfected in reliance upon this rule; that by its decision in this case the State Supreme Court holds that a transaction such as that described does operate to create a new corporation (but in this counsel ignores the fact that the Consolidated Company was granted many franchises not possessed by the Minnesota Western Company as well as the very plain expression of the legislative intention); that, therefore, the construction given to the Act of 1881, by the State Court, taken in connection with its holding that plaintiffs in error are estopped to deny the constitutionality of that Act, constitutes a fraud upon the plaintiffs in error, an impairment of the obligation of their contract, and a taking of their vested rights. (*Brief of Plaintiffs in Error on Motion to Dismiss or Affirm, pp. 33 to 38*).

Even if the conclusion, thus arrived at, followed from the premises stated (and it does not), the action complained of was

merely an erroneous construction of a contract by the State Court, and cannot operate to confer jurisdiction here.

Mitchell vs. *Lenox, 14 Pet., 49.*

And see, as directly in point,

Land Company vs. *Laidley, 159 U. S., 103, pp. 109 to 112;*
Bacon vs. *Texas, 163 U. S., 207, pp. 220 to 224.*

2. But *no* claim that plaintiffs in error have been deprived of rights vested in them by the Act of 1881, or that the obligation of a contract between them and the State contained in that Act has been impaired can avail to confer jurisdiction of this cause upon this Court.

Plaintiffs in error cannot raise in this Court any Federal question that was not raised, as appears upon the face of the record, prior to judgment in the Supreme Court of Minnesota.

See *R. R. & Banking Company* vs. *Marshall, 12 How. 165;*
Mich. Cen. Railroad Company vs. *Mich. So. Railroad Company, 19. How., 378;*
Texas & Pacific Railroad Company vs. *Southern Pacific Company, 137 U. S., p. 48, and cases cited;*
California Powder Works vs. *Davis, 151 U. S., p. 393;*
Zadig vs. *Baldwin, 166 U. S., 485, p. 488;*
Railroad Company vs. *Louisville, 166 U. S., 709;*
Miller vs. *Cornwall Railroad Company, 168 U. S., 131, pp. 133 and 134;*
Kipley vs. *Illinois, 170 U. S., 182, pp. 187 and 188;*
Water Power Company vs. *Street Railway Company, 172 U. S., 475, pp. 487 and 488;*
Bank vs. *Owensboro, 173 U. S., 636.*

An examination of the pleadings in this case and of the assignment of errors upon appeal to the Minnesota Supreme Court (*Record, fols. 12 to 14*) will readily discover the only Federal question raised by plaintiffs in error in either the Dis-

trict Court or the Supreme Court of Minnesota and the manner in which that question was raised.

The defendant in error was asserting against the individual plaintiffs in error the right to recover from them certain amounts of money which he alleged they, as shareholders in the Consolidated Corporation, had become liable to pay under and in accordance with the provisions of Section 3, Article X, of the Minnesota Constitution.

The plaintiffs in error, in opposition set up:

(1) That by a contract between the State of Minnesota and the Minnesota Western Railroad Company, *contained in the Act of 1853*, the shareholders of that company were granted perpetual immunity from all such liability, and that the provision of the Minnesota Constitution above mentioned, if by its terms applicable to the Minnesota Western Railroad Company, is void in so far as it purports to affect shareholders of the Minnesota Western Railroad Company, being a law of a State impairing the obligation of this contract;

(2) That the Consolidated Corporation, in which the plaintiffs in error are admittedly shareholders, is the Minnesota Western Railroad Company, simply reorganized under another name;

(3) Therefore, that the individual plaintiffs in error, being shareholders in the Minnesota Western Railroad Company, are exempt from all individual liability for the claim asserted by defendant in error.

The truth of each premise of the foregoing syllogism was denied by defendant in error.

By his denial of the major premise, two questions were raised *which, however, could become material only in case the Consolidated Company and the Minnesota Western Railroad Company were held to be identical*, (1) whether *the Act of 1853* did confer such perpetual, or any, immunity upon the shareholders in the Minnesota Western Railroad Company, and (2) whether Section 3, Article X, of the Minnesota Constitution, if applied to the shareholders of the Minnesota Western Railroad Company, did, in view of all the facts, impair the obligation of the *contract contained in the Act of 1853*. These two questions, together, constituted a "Federal question."

That this was the Federal question, and the only one, raised below is plain upon the face of the record. The ANSWER of the individual defendants (plaintiffs in error) filed in the District Court, contains the following allegations: "That the said Minneapolis and St. Louis Railway Company was incorporated *prior* to the adoption or enactment of the constitutional provisions and statutes referred to. That said Minneapolis and St. Louis Railway was incorporated IN THE YEAR 1853, UNDER AND PURSUANT TO THE PROVISIONS OF CHAPTER 66 OF THE SPECIAL LAWS ENACTED BY THE LEGISLATURE OF THE TERRITORY OF MINNESOTA IN THE YEAR 1853, under and by the name of the Minnesota Western Railroad Company, and which name was subsequently changed to the Minneapolis and St. Louis Railway Company, substantially as set forth in the first division of said complaint. *That the liability of the stockholders of said Minneapolis and St. Louis Railway Company was fixed by said act of incorporation*, AND NOT OTHERWISE; and that the constitutional provision and laws referred to in the complaint are not applicable to or binding upon these defendants in that behalf." (*Record, fols. 83 and 84.*)

It will be noticed (1) that the only reference made to any contract or alleged contract is to the Act of 1853, (2) that this act is designated as Chapter 66 of the Territorial Laws of 1853, thus excluding the idea that reference to any amendatory act was intended, and (3) that it is expressly asserted that this act is the only one affecting the rights of the parties.

There is no other allegation in the pleadings of the plaintiffs in error which, even by implication, claims the benefit of any contract or of any provision of the Constitution of the United States.

The REPLY of the defendant in error contained the following, directed to allegations of the answer of plaintiffs in error, last quoted:

"Plaintiff denies that said Minneapolis and St. Louis Railway Company was incorporated prior to the adoption or enactment of the constitutional provisions and the statutes referred to in the plaintiff's amended complaint herein and alleges that said defendant, The Minneapolis and St. Louis Railway Company, was incorporated and exists under and by virtue of the act of the legislature of Minnesota, approved March 2, 1881 * * * and of the consolidation agreement entered into * * * as alleged in plaintiff's amended complaint herein,

and not otherwise; and that said incorporation occurred and said defendant, The Minneapolis and St. Louis Railway Company, began to exist as a corporation June 1, 1881, and not previously" (*Record, fol. 100*).

Thus, a distinct issue was raised as to whether the rights and liabilities of the plaintiffs in error as shareholders had been established by the Act of 1853 or by the Act of 1881; the plaintiffs in error asserting that they had been established by the former act, and by that act only.

In the ASSIGNMENT OF ERRORS, filed in the Minnesota Supreme Court, there are but three assignments by means of which any attempt is made to claim the protection of the Federal Constitution. They are as follows:

(1.) "The court erred in holding that Section 3, Article X, of the State Constitution if applied to the defendant railway company did not violate Section 10, Article 1, of the Constitution of the United States, in that the provisions of said Section 3, Article X, impaired the obligation of the charter contract *contained in said Chapter 66, laws of 1853, Territory of Minnesota*" (*Assignment VII; Record, fol. 12.*)

(2.) "The Court erred in holding that Section 3, Article X, of the State Constitution if applied to the defendant railway company is not in violation of the Fourteenth Amendment of the Constitution of the United States, in that the State of Minnesota, by and through the provisions of said Section 3, Article X, assumed to impair and destroy rights *theretofore* vested in said defendants" (*Assignment VIII; Record, fol. 13*).

(3.) "The Court erred in holding that Section 3, Article X, of the State Constitution, if applied to the defendant railway company, is not in violation of the Fourteenth Amendment to the Constitution of the United States in that the State of Minnesota, by and through the provision of said Section 3, Article X, assumes to abridge the privileges and immunities of the defendants as citizens and to deny to defendants the equal protection of the laws, and to deprive them of their property without due compensation or due process of law." (*Assignment IX; Record, fol. 13*).

Now, it will be noted that Assignment VII expressly refers to the contract contained in the Act of 1853 and to no other contract. It is evident that Assignment VIII and Assignment IX are but repetitions, in different forms, of the same claim invoking the protection of the Fourteenth Amendment of the

Federal Constitution. The rights referred to in Assignment VIII are the rights "theretofore vested in said defendants," that is to say, prior to the adoption of the State Constitution; and it is evident that the privileges and immunities referred to in Assignment IX, and the property referred to in the same assignment, are the privileges, immunities and property rights claimed by the defendant under the Act of 1853, and no other.

It must now be plain that the only contract relied upon in the courts below by plaintiffs in error—the only contract the obligation of which they asserted to be impaired by Section 3, Article X, of the Minnesota Constitution—was the one contained in the Act of 1853.

It will not do to say that, because the Act of 1881 was in form an amendment of the Act of 1853, plaintiffs in error, when they invoked the Federal Constitution in support of the contract contained in the Act of 1853 and asserted the impairment of the obligation that contract must also have invoked the same support for the contract now alleged to be contained in the Act of 1881. (*See Brief of Plaintiffs in Error on Motion to Dismiss or Affirm, pp. 30 to 33.*) In the courts below, at all stages of this case, the distinction, amounting even to antagonism, between the two acts was so clearly drawn as to exclude the idea that reference to or mention of one implied reference to the other. No claim that the Act of 1881 should be held to relate back, or that any contract contained in it had been impaired, was ever even suggested. The sole discussion of that act, even in the briefs or arguments ounsel, of c related to the proper construction to be placed upon it.

It follows that this claim cannot now operate to confer jurisdiction upon this court.

II.

We have left to consider the inquiry, whether the Federal question that plaintiffs in error did raise in the Supreme Court of Minnesota was decided by that Court, or was decided in such manner as to confer upon this Court jurisdiction to review its decision.

Plaintiffs in error claimed to be shareholders in the Minne-

sota Western Railroad Company; that, as such they were entitled, under contract contained in the Act of 1853, to immunity from individual liability; that Section 3, Article X., of the Minnesota Constitution (a statute of the State), when applied to them, impaired the obligation of their contract and deprived them of their property without due process of law, and, to that extent, was repugnant to the Constitution of the United States. The case, if this Court has jurisdiction of it at all, must, therefore, fall within the second of the classes of cases enumerated in Section 709 of the Revised Statutes; that is to say, if this Court has jurisdiction it must be because there has been drawn into question the validity of a statute of a State on the ground that such statute is repugnant to the Constitution of the United States, the decision whereon has been in favor of the validity thereof.

It is not sufficient for the maintenance of the jurisdiction of this Court that the validity of a law of the State has been drawn into question on the ground that the law is repugnant to the Federal Constitution. The validity of the law must have been sustained. Nor, for that matter, is it sufficient that an immunity has been claimed under the Federal Constitution. Such immunity must have been denied.

See *Israel* vs. *Arthur*, *152 U. S., p. 361.*
Also *Eustis* vs. *Bolles*, *150 U S., 361, p. 366.*
Pierce vs. *Somerset Ry.*, *171 U. S., 641.*
Capital Bank vs. *Cadiz Bank*, *172 U. S., 425.*
Allen vs. *Southern Pacific R. R. Co.*, *173 U. S., 479.*

"It is settled law that, to give this Court jurisdiction of a writ of error to a State Court, it must appear affirmatively, not only that a Federal question was presented for decision by the State Court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal Laws or Constitution, or that the judgment as rendered could not have been given without deciding it." (*Eustis* vs. *Bolles*, *150 U. S., p. 366.*) It is apparent, therefore, that this Court cannot have jurisdiction in this case, unless the decision of the Minnesota Supreme Court sustained the validity of Section 3, Article X., of the State Constitution, *as against the objection that it operated to impair the obligation of the contract contained in the Act of 1853.*

If the Supreme Court of Minnesota had determined the Consolidated Company to be identical with the Minnesota Western Railroad Company, that is, if it had determined that the plaintiffs in error were shareholders in the last-named company, it would have been obliged to pass upon the Federal question raised by plaintiffs in error, and if in passing upon that question the Court had determined either that the Act of 1853 did not contain an exemption such as was claimed by plaintiffs in error, or if, admitting the existence of the exemption, it had held that nevertheless, they were liable for debts contracted after the adoption of the Minnesota Constitution, it is plain that the record would have disclosed a Federal question and that this Court would have possessed jurisdiction. But the Supreme Court of Minnesota did nothing, whatever, of this sort. Having determined that the Minnesota Western Railroad Company and the Consolidated Company were distinct and independent corporations, it was not called upon to construe the Act of 1853. It did not attempt to decide what rights or immunities that act secured to the Minnesota Western Railroad Company or its shareholders. It did not decide in any way, even by the remotest inference, whether by the terms of the Constitution of Minnesota, shareholders of the Minnesota Western Railroad Company were made liable personally for any of its debts. Nor did it attempt to decide whether, if Section 3, Article X, of the Minnesota Constitution by its terms applied to shareholders in the Minnesota Western Railroad Company, the provisions thereof as so applied, were or were not valid under the Federal Constitution. Upon the contrary, the Court expressly repudiated any intention to decide any of these questions. At one point in its decision, it says: "Whatever may be the liability of the several (constituent) corporations we need not inquire, because the liability here sought to be enforced is one against individuals who have been and are stockholders in the new corporation." (*Record, fols. 185 and 186.*) And again: "Other questions have been raised and discussed by the respective counsel, but a decision upon them by this Court in this action is entirely unnecessary, and we express no opinion thereon." (*Record, fol. 188.*) See also the syllabus (*Record, fol. 178*) which in Minnesota is required to be prepared by the Court itself. (*G. S. Minn., 1894, Sec. 4826.*)

In other words, the fact is that while the plaintiffs in error

have drawn in question the validity of a provision of the State Constitution upon the ground of its being repugnant to the Constitution of the United States, no decision in favor of the validity of the State Constitution has been made.

But counsel for plaintiffs in error says that, while the State Supreme Court did not expressly pass upon the Federal question raised below, *the effect* of its action was to decide that question adversely to his clients. This is not true; but if it were the fact would not avail to improve the position of the plaintiffs in error, for this tribunal has held many times that if a case involve two questions, one Federal, the other non-Federal, and both questions be decided against the plaintiff in error, if the decision of the question not Federal be sufficient to support the judgment rendered, this Court cannot entertain jurisdiction.

Klinger vs. Missouri, 13 Wall, 257 p. 263;
Johnson vs. Risk, 137 U. S., 300;
Eustis vs. Bolles, 150 U. S., 361, pp. 366 and 367;
Rutland R. R. Co. vs. Central Vermont R. R. Co., 159 U. S., 630.
Missouri Pac. Ry. Co. vs. Fitzgerald, 160 U. S., 556, p. 576;
Union National Bank vs. L. N. A. & C. Ry. Co., 163 U. S., 325;

Indeed the rule goes further, for if the judgment of a State Court may, so far as appears, have been based upon either of two grounds, one involving and the other not involving a Federal question, and if a decision based upon the latter ground only would be sufficient to support the judgment, this Court is without jurisdiction.

Michigan vs. Flint & Pere Marquette R. R. Co., 152 U. S., 363;
Dibble vs. Land Company, 163 U. S., 63;
Harrison vs. Morton, 171 U. S., 38;

But it *affirmatively* appears by the record that this case was decided *exclusively* upon a ground not involving a Federal question, and that the decision thereon is sufficient to support the judgment.

It had been been admitted that the debt owing to the defendant in error was the debt of the Consolidated Company; that the plaintiffs in error were shareholders in that Company and had been sued as such, and it was conceded that they could not claim to be shareholders in the Minnesota Western Railroad Company or entitled to the benefits conferred by its charter unless that Company and the Consolidated Company were really identical. It had also been admitted that the Consolidated Company was organized in 1881, and it was not disputed that if that Company was in fact a new corporation, distinct from the Minnesota Western Railroad Company, the provision of the Minnesota Constitution, establishing and defining the liability of shareholders, was applicable to its shareholders who, in that case, could claim no contract exempting them from individual liability.

Now, on the threshold of the case, the defendant in error, as we have seen, denied that the Consolidated Company was either identical with or a mere reorganization of the Minnesota Western Railroad Company. He asserted, on the contrary, that the two corporations were distinct and independent of each other. It will be perceived, therefore, (1) that the question whether the two companies were really identical was one that the State Court was forced to decide; (2) that this question was not Federal in its nature, and (3) that, upon the contrary, the decision of the question in the negative not only obviated the necessity of considering the nature of the contract set up by plaintiffs in error (that contained in the Act of 1853) or the question of the applicability of Section 3, Article X, of the Minnesota Constitution to shareholders in the Minnesota Western Railway Company, or the validity of that section if so applied under the Federal Constitution, but would have rendered immaterial a decision of these matters or of any of them, in case the Court had chosen to make such decision.

The brief filed by plaintiffs in error upon motion to dismiss or affirm seems, however, to proceed upon the theory that the question whether the Minnesota Western Railroad Company and the Consolidated Company were really identical was a Federal question. They assert that, inasmuch as they claimed in the State Court that the Act of 1853 granted a certain immunity to their corporation, and therefore to them, and the Court decided that the immunity claimed, if granted at all,

was granted, not to their corporation, but to another and had never been acquired by their corporation, and arrived at this decision through a construction of the Act of 1881, this Court must possess jurisdiction to construe that act in order to determine for itself whether their corporation was not, in fact, the grantee of the immunity set up.

It cannot be claimed that such jurisdiction arises by reason of the circumstance that the State Court in arriving at its decision, was obliged to construe the Act of 1881, for it has on numberless occasions been said in the decisions of this tribunal: "The construction given by the Courts of the State to State legislation and to State constitutions are conclusive upon this Court with a single exception, and that is when it is called upon to interpret the contracts of States, although they have been made in the forms of law."

Jeff. Branch Bank vs. *Skelly*, *1 Black*, *436*, *p. 443.*

See also

New Orleans Water Works vs. *La. Sugar Co.*, *125 U. S.*, *18*, *p. 30;*

St. P. M. & M. Ry. Co., vs. *Todd County*, *142 U. S.*, *282;*

New Orleans vs. *New Orleans Water Works*, *142 U. S.*, *79;*

Miller's Executors vs. *Swann*, *150 U. S.*, *132;*

Eustis vs. *Bolles*, *150 U. S.*, *361*, *and cases cited.*

Nor can jurisdiction be claimed upon the ground that the State Court held (as it did hold) that the Legislature could not constitutionally authorize the old company to transfer or the new company to take the right of immunity in question.

Sherman vs. *Smith*, *1 Black*, *587*, *p. 594;*

Snell vs. *Chicago*, *152 U. S.*, *191;*

The theory of plaintiffs in error, therefore, must be founded upon the assumption that this Court has jurisdiction, upon writ of error to a State Court, to determine for itself the identity or non-identity of the party claiming the right involved with the person to whom it is granted.

This case is in the respect under discussion analogous to one in which A claims to be the person to whom a right has been granted under the name of B, the other party to the controversy contending that A. is not B. Would it be contended in

such a case, that this Court possessed jurisdiction to review a decision that A. and B. were different persons? Certainly not. It is true that, in the case suggested, the question whether A. and B. are identical is purely a question of fact. But if this Court has jurisdiction to determine this question of identity and therefore to construe a statute of a State which otherwise it would have no authority to construe, certainly the same paramount right and necessity to determine the question for itself would exist even if the question were one of pure fact. Moreover, the truth is that the identity or non-identity of the party claiming a contract right with the person with whom the contract had been made is, in the ultimate, always a fact, whether that fact be ascertained by the examination of evidence or the construction of a statute or a document.

It is evident that the theory of plaintiffs in error proves too much.

So much of the principal question considered and decided by the State Court.

It will hardly be contended that a Federal question was involved in any other of the matters treated in the decision of that Court.

After deciding that the Consolidated Company was a corporation distinct from and independent of the Minnesota Western Railroad Company, it went on to determine the scope of Section 3, Article X., of the State Constitution, holding that provision applicable to all shareholders in every corporation (with certain immaterial exceptions) organized after the adoption of the State Constitution, and particularly, that railroad companies did not fall within either of the classes excepted by the terms of the section. It, therefore, held that the constitutional provision in question applied to the shareholders in the Consolidated Company.

As it is not even now claimed that this provision of the State Constitution entered into the contract set up by plaintiffs in error, but is claimed, on the contrary, that it operates to impair that contract, it must be and, I think, is conceded that this Court has no jurisdiction to review this action of the State Supreme Court.

See *C. M. & St. P. Ry, Co.* vs. *Minnesota, 134 U. S., 418, p. 456;*
and, also, *Sherman* vs. *Smith, 1 Black, 587, p. 594.*

The State Court further held, at least by necessary implication, that the individual plaintiffs in error had, by taking their stock in and accepting the benefits of the Consolidated Company, voluntarily assumed the obligations attached thereto under the Minnesota laws. (*Record, fols. 178, 185 and 186.*) This was simply the statement of a self-evident implication of general law.

In conclusion, the State Court held that even if the Act of 1881, in view of the construction given to it by that Court, ought to be held unconstitutional as a special act of incorporation, and, therefore, within the prohibition of such acts contained in the State Constitution, the plaintiffs in error were estopped, by reason of their participation in the benefits of the act and their conduct in holding the Consolidated Company out to the world as a corporation, to assert the unconstitutionality of the act. This again was a decision upon a question of purely local law.

See *Eustis* vs. *Bolles, 150 U. S., 361;*
Pierce vs. *Somerset, 171 U. S., 641.*

These holdings together constituted the whole decision of the Minnesota Supreme Court. Each of them is a determination of a matter of fact or of local law, and in no way involves or implies a decision upon the Federal question raised in the Court below. That the decision is sufficient to sustain the judgment rendered is evident from this, that if in addition to the decision actually made each of the propositions involved in the Federal question presented had been decided in favor of the plaintiffs in error, the whole decision would have been perfectly consistent and the judgment must have been the same.

I submit that this case ought to be controlled by the decision of this Court in *Eustis* vs. *Bolles, 150 U. S., 361, pp. 366 and 367.*

Cf. Eustis vs. *Bolles, 146 Mass., pp. 414 to 417.*

See, also,

Beaupre vs. *Noyes, 138 U. S., 397.*

I have demonstrated, I believe, both that no Federal question was decided by the State Court, and that if the Federal question raised had been decided, no jurisdiction in this Court would have existed for the reason that the judgment rendered

is founded upon the decision of a question not Federal in its character, which decision is alone sufficient to support the judgment. It follows that this Court has not jurisdiction of the case, and that the writ of error should be dismissed.

THE CONSOLIDATED COMPANY WAS BROUGHT INTO EXISTENCE UNDER THE AUTHORITY OF THE ACT OF 1881. ITS SHAREHOLDERS ARE, THEREFORE, SUBJECT TO THE LIABILITY IMPOSED BY SECTION 3, ARTICLE X, OF THE MINNESOTA CONSTITUTION.

I.

The Supreme Court of Minnesota has decided that the personal liability imposed upon shareholders by the State Constitution attaches to the shareholders in every railroad corporation brought into existence subsequently to the adoption of the constitution, and specifically that it attaches to the shareholders in any new corporation formed under the authority of Act of 1881; and, whatever else it may do, this Court certainly will not give to the Minnesota Constitution, the law that plaintiffs in error claim impairs the obligation of their contract, a construction different from that adopted by the Supreme Court of the State in this case.

If, then, the Consolidated Company *is* a new corporation brought into existence under authority of the Act of 1881, plaintiffs in error, who are admittedly shareholders in that company, cannot seriously claim any contract exempting them from personal liability for corporate debts. Upon the contrary it must be admitted, in that case, that in their very contract they have assumed the personal liability imposed by the Constitution, which was then in full force. Any one taking advantage of the Act of 1881, to organize a new corporation must have done so (whatever the terms of the act itself) in contemplation of the fact that the authority granted to and exercised by him was coupled by the supreme legislative will with the burden of personal liability for corporate debts, and that the assumption of this liability, established as it had been as a condition not only of his exercise of the authority and enjoy-

ment of the rights granted but of the legislature's power to grant any authority or right, was implied in his act. Any one thereafter acquiring stock in a company so organized, as did the individual plaintiffs in error, must have done so in contemplation of the same facts and must be considered voluntarily to have assumed and contracted for the liability imposed by the Constitution upon all shareholders in every such company.

For closely analogous cases see

Shields vs. *Ohio*, *95 U. S.*, *319*, affirming *26*, *Ohio St.*, *86*. Ashley vs. Ryan, 153 U. S., 436;
State vs. Northern Central Ry. Co., *44 Md.*, *131*;
Charlotte C. & A. R. R. Co. vs. Gibbes, *27 S. C.*, *385*;
Frazer vs. Railway Co., *88 Tenn.*, *138*;
Morawetz on Corporations, *Secs. 944-47*;
Thompson on Corporations, *Sec. 5424*.

Was, then, the Consolidated Company brought into existence under authority of the Act of 1881? And, if so, was it when so brought into existence a substantially new corporation?

It is admitted that *this particular organization*, whatever its character may be, was brought into existence under authority of the Act of 1881, and of that act only, on the first day of June of that year. It was constituted strictly in accordance with the provisions of subsections 10 to 14 of that act, and with the manifest and undeniable intention that it should be the organization therein contemplated. It must necessarily therefore be whatever sort of organization was authorized by those provisions, and we must determine the nature and status of the company by ascertaining whether the authority contained in the sub-sections 10 to 14 of the Act of 1881 was for the organization of a new corporation or merely for a reorganization of the Minnesota Western Railroad Company. If the authority conferred was for the organization of a new company, the plaintiffs in error, when they acquired their stock in it, assumed and agreed to a personal liability for the debts of the Consolidated Company to an amount equal to the par value of the stock held or owned by them.

We are brought, then, to the question: What was the authority conferred by the Act of 1881?

The intent of the act that the Consolidated Company, if one should come into existence, should be regarded as a new and independent corporation, is plain upon the face of the act. The Consolidated Company authorized is repeatedly spoken of as a "new corporation." (In Sec. 1, Sub-Sec. 10, Sub-Div, First, and in Sub-Secs. 11, 12, 13 and 14 it is so spoken of at least sixteen times.). The constituent companies are constantly spoken of as the "old corporations," and the "former corporations," and a manifest intention that they should be regarded as distinct from the Consolidated Company is shown by the provision that they "shall be deemed to continue in existence so far as necessary" to preserve the rights of creditors. The distinct and independent character of the Consolidated Company is made especially apparent in the provision authorizing the substitution of the new company in suits then pending against any of its constituent companies. (*Sub-Sec. 13.*)

The act of consolidation requires entirely new articles of incorporation to be adopted and filed. It permits the capital stock, and the par value of the shares of stock, in the Consolidated Company, and the classification of its stock, to be determined in these new articles, without reference to the conditions existing in the constituent companies, or any of them. It provides for the issuance of its own new stock by the Consolidated Company. It requires the consent to the consolidation of two-thirds in amount of the shareholders representing each constituent company. It provides a method by which shareholders in the constituent companies may be forced to assent to the arrangement or to withdraw, and a remedy by means of which they may obtain compensation. Ownership of stock in any of the constituent companies does not entitle any one to any voice in the management or interest in the assets of the new company, merely to the right to exchange his stock for that of the new company or to money compensation for his loss of property interest, in case he refuses to exchange. These provisions are absolutely incompatible with any idea that the Consolidated Company was intended to be a mere reformation of the old companies or of any one of them.

The existence of a distinct provision of the same act by

which the old Minneapolis & St. Louis Railway (Minnesota Western) Company was expressly permitted to acquire the lines of other companies while retaining its original charter intact, makes it plain that the Legislature intended that in case of consolidation a new corporation should come into existence.

That the distinction intended between the Consolidated Company to be organized and the Minnesota Western Railroad Company was not to be one of mere form, but was a real and substantial distinction is also evident, for the new company was to have not only the new powers that I have already enumerated but was to acquire (so far at least as such course should be compatible with the general laws of the State) all the franchises of any and all other companies of certain classes designated in the act with which the Minnesota Western Railroad Company might unite to form a new company. *The possession of these new franchises distinguished the new company from the Minnesota Western Railroad Company as broadly and substantially as any one of the other constituent companies joining in the consolidation had been distinguished from the Minnesota Western Railroad Company.*

The intent of the constituent companies, themselves, to organize a new corporation, distinct from and independent of the Minnesota Western Railroad Company, is evident from their action in taking advantage of all the powers conferred upon a Consolidated Company that had not been possessed by the Minnesota Western Railroad Company and was emphasized by the adoption of a distinct name.

And my conclusion is confirmed when we remember that this Act of 1881 was formulated and adopted in view of the decision of the Minnesota Supreme Court in *Fitz.* vs. *Minnesota Central Railroad Company, 11 Minn., 414 (Gil. 304).*

The differences that distinguish the present (consolidated) The Minneapolis & S. Louis Railway Company from the old Minneapolis & St. Louis Railway Company (Minnesota Western Railroad Company) are much more numerous and important than were the differences that distinguished the Minnesota Central Railway Company from the Minneapolis & Cedar Valley Railroad Company, discussed in the Fitz. case. In that case it was determined that the two corporations there considered were plainly distinct.

See also

Huff vs. *Railroad Company, 11 Minn. 180 (Gilfillan 114);*
Shields vs. Ohio, 95 U. S., 319;
State vs. No. Cen. Ry. Co., 44 Md., 131;
R. R. Co. vs. Gibbes, 27 S. C., 385;
Frazer vs. Ry. Co., 88 Tenn., 138;

Cf. *Ames* vs. *L. S. & M. Railroad Company, 21 Minn. 241.*

The fact that the Act of 1881 was cast in the form of an act amendatory of the act incorporating the Minnesota Western Railroad Company is only one item of evidence (and in this instance an extremely unimportant item) as to the intention of the Legislature, and can have little weight in view of the plain and unambiguous lauguage of the act itself.

See *Ames* vs. *L. S. & M. R. R. Co., 21 Minn. 241.*

It does not seem to admit of doubt that the Consolidated Company was a new corporation, independent of the Minnesota Western Railroad Company and distinct from it in substantial respects. It follows that the individual plaintiffs in error, by becoming shareholders in it, assumed the liability imposed by the State Constitution upon shareholders generally, *whatever the provisions of the Act of 1881 upon that subject may have been.*

II.

But I believe a careful perusal of that act will convince the court that it was no part of the purpose of the act to transfer to the shareholders of any consolidated company organized by its authority the exemption from individual liability for corporate debts, if any, possessed by the shareholders in the Minnesota Western Railroad Company.

(Plaintiffs in error do not claim that the Legislature had capacity in 1881, to authorize the transfer to the shareholders in the Consolidated Company of the exemption from personal liability possessed by the shareholders in either of the Iowa corporations that joined in the consolidation.)

The contrary claim is founded upon the two following provisions contained in the act:

"Upon the consummation of said act of consolidation, as aforesaid, all and singular the rights, privileges, exemptions and franchises of each of said corporations parties to the same, and all the property, real, personal and mixed, and all debts due on whatever account to either of said corporations, as well as all stock subscriptions and other things in actions belonging to either of said corporations, shall be taken and deemed to be transferred to and vested in such new corporation" (*Sub-Sec. 12*). "Provided, that nevertheless the privileges, franchises, exemptions and immunities hitherto granted to the Minneapolis & St. Louis Railway Company shall continue to be vested in such new corporation, with the same effect as if originally granted thereto" (*Sub-Sec. 14*).

The intent of these provisions is manifestly to transfer to the new corporation all of the immunities to which any constituent company was entitled *as a corporate body*. Now, even if it were a fact that the shareholders in the Minnesota Western Railroad Company were not subject to the constitutional liability (a proposition that I deny), this condition would not have depended upon any exemption or immunity to which that Company was entitled. If the immunity of shareholders existed, it existed in favor of *the shareholders* of the company by reason of the fact that no competent authority had ever imposed the liability upon them and they, themselves, had not voluntarily assumed it. The immunity depended, if it existed at all, not upon any grant to the corporation, but upon the absence of positive enactment in connection with a rule of law that in the absence of such enactment the shareholders in a corporation are not personally liable for its debts and another (alleged) rule that, in the absence of reserved power so to do, the State cannot after shareholders have made investments upon the faith of such immunity, impose a personal liability upon them without their own consent.

The only other provision of the Act of 1881 which can be claimed to show an intention that the shareholders of a consolidated company formed under it shall be exempt from personal liability for corporate debts is the following, contained in Section 11:

"And the stock of the new corporation * * * shall be deemed and taken as lawful stock and subject only to such further payments, calls or assessments, if any, as may be mentioned in the said consolidation agreement."

It is manifest from the connection in which the provision occurs, as well as from the words chosen, which, it will be noted, do not include the word "liability," that it was the intention of the legislature by this provision to permit the new corporation to make its stock full paid, if it chose, or to provide, in case it preferred, that the stock should be subject to certain further calls or assessments, or to call or assessment in the discretion of its Board of Directors; but there is nothing to indicate that the legislature had in mind the constitutional "double" liability of the shareholders.

I contend, therefore, not only that the constitutional liability attached to, and was assumed and agreed to by, the shareholders of the Consolidated Company *despite* anything contained in the Act of 1881, but that the act contains no indication of an intention to transfer to those shareholders the exemption, if any, theretofore possessed by shareholders in the Minnesota Western Railroad Company.

Indeed, I go farther. The act indicates a positive intent to impose the constitutional liability upon shareholders in any consolidated company organized under it.

Sub-section 11 contained the following:

"And such new corporation * * * *shall be subject to all the restrictions and duties imposed by the laws of this State;*

and Sub-section 14 contains the following:

"All the provisions of the general laws of this State in regard to railroad corporations shall be applicable to any new corporation formed by consolidation under the provisions of this act, except so far as the same shall not be applicable thereto by reason of the situation of portions of its line without this State."

These provisions seem to me to show the plain intention of the Legislature and agreement of plaintiffs in error that the company to be formed and its shareholders should be subject to all the laws of the State that would be applicable to a corporation organized under the general laws of the State or to its

shareholders. One of these is that contained in Section 3, Article X, of the State Constitution.

If this be true, it is immaterial whether the Consolidated Company be distinct from the Minnesota Western Railroad Company, for even though the two companies should be considered the same, the shareholders must be held to have assumed an individual liability for corporate debts to the extent fixed by the State Constitution.

EVEN IF THE SHAREHOLDERS IN THE CONSOLIDATED COMPANY POSSESS ALL THE RIGHTS AND IMMUNITIES POSSESSED BY THE SHAREHOLDERS OF THE MINNESOTA WESTERN RAILROAD COMPANY PRIOR TO THE PASSAGE OF THE ACT OF 1881, THEY ARE NEVERTHELESS LIABLE UNDER THE MINNESOTA CONSTITUTION FOR CORPORATE DEBTS CONTRACTED SUBSEQUENTLY TO THE ADOPTION OF THAT INSTRUMENT.

I.

The Act of 1853 contained the following provision: "The legislature may at any time amend or alter this act" (*Section 22*). This reservation was repealed by the Act of 1870; but while it was still in force the State Constitution was adopted, and that instrument contained this provision: "Each stockholder in any corporation shall be liable to the amount of stock held or owned by him."

We contend that the adoption of this constitutional provision amounted to an amendment of the charter of the Minnesota Western Railroad Company, valid under the reservation contained in the charter, even if the company had then been fully organized and already engaged in the prosecution of its corporate enterprise.

In considering this proposition three questions suggest themselves: First, could a charter such as the one here in question be constitutionally altered by a law of the State, enacted in the exercise of the power reserved, so as to affect the liability of shareholders for debts thereafter contracted? Second, could this be done by constitutional enactment, as

distinguished from legislative enactment? Third, was the constitutional provision here in question intended to apply to special charters such as the one under discussion?

(*First.*) I do not understand whether it is conceded by counsel for plaintiffs in error that, had the charter of the Minnesota Western Railroad Company contained a provision reserving the right to "amend or *repeal*" the charter act, the state could, by appropriate act, have altered the liabilities of shareholders at any time during the period that elapsed prior to the repeal of such provision. In any case, this doctrine is too well established to permit profitable contention to the contrary.

See *In the matter of Oliver Lee & Company's Bank, 21 N. Y., pp. 10 to 13, and 14 to 19.*

This case went to the Court of Appeals of New York on appeal from a final order of the Supreme Court at General Term in a proceeding to enforce the liability of shareholders in Oliver Lee & Company's Bank of Buffalo. This bank had been organized pursuant to the general banking law of 1838, and commenced business in January, 1844. The banking law *provided that the shareholders in banks organized under it should not be subject to any personal liability not voluntarily assumed in their articles of association.* In it, however, the legislature reserved a right to repeal or amend it. The bank failed in 1857, owing debts in excess of five hundred thousand dollars, all of which had been contracted after January 1st, 1850. Subsequently to the organization of the corporation, but prior to the contracting of any of the debts referred to, the constitution of the State of New York had been amended so as to impose a double liability upon shareholders in banks of issue, and in 1849 a statute of the state had been passed to enforce this constitutional provision. It was contended by the defendant shareholders that the provisions of the constitution and that of the act of 1849 should not be held to apply to banking corporations created before the adoption of the constitution, but that if by the true construction of the constitution and statute they did apply to such banks, they were violations of the provisions of the constitution of the United States, by which states are forbidden to pass any law impairing the obligations of contracts. The Court of Appeals overruled these contentions.

The case came to the Supreme Court of the United States, and was decided by this court under the title of *Sherman vs. Smith, 1 Black, 587.* The following quotation embodies the material parts of the decision of this court:

"As this case comes before us under the 25th Section of the Judiciary Act, the only question involved is, whether or not the court below erred in denying a right set up by the plaintiff in error under the constitution of the United States, in other words, whether the constitution of the State of New York, of 1846, or the act of the legislature of 1849, or both, which subjected the stockholders of the bank to personal liability for its debts accruing after the first day of January, 1850, impaired the obligation of any contract with the stockholders in its charter?

"The general banking law of 1838, under which this bank was organized, provided in the 23rd Section, that 'no shareholder of any such association shall be liable in his individual capacity for any contract, debt or engagement of such association, unless the articles of association by him signed shall have declared that the shareholder shall be liable.'

"The 15th Section provided. that 'any number of persons may associate to establish offices of discount, deposit and circulation, upon the terms and conditions, and subject to the liabilities prescribed in this act.'

"One of the articles of association, as we have already seen, provided that the shareholders should not be liable in their individual capacities for any contract, debt, &c.

"The 32d Section of the general banking act provided, that 'the legislature may at any time alter or repeal this act.'

* * *

"Now, in the first place, it is to be observed that the article of association relied on is but an affirmation of the principle contained in the 23rd Section of the act of 1838, and can be entitled to no greater effect or operation than the law itself, unless, indeed, by incorporating it into the articles, it can be made permanent or perpetual."

* * *

"Another view of this question, even assuming that the stipulation of the stockholders in the article of association amounted to a contract, is equally conclusive against the stockholder.

"According to the 15th Section, the association was authorized to establish a bank of discount, deposit and circulation, 'upon the terms and conditions, and subject to the liability prescribed in this act.' It was not competent for the association to organize their bank upon any other terms or conditions, or subject to any other liabilities, than those prescribed in the general charter. Now, the 32d Section, which reserved to the

legislature the power to alter or repeal the act, by necessary construction, reserved the power to alter or repeal all or any one of these terms and conditions or rules of liability, prescribed in the act. The articles of association are dependent upon, and become a part of, the law under which the bank was organized, and subject to alteration or repeal, the same as any other part of the general system."

And this court held that the obligation of the contract between the State of New York and the shareholders of the bank had not been impaired and affirmed the judgment of the New York Court of Appeals.

The following cases are also analogous and many of them upon principle quite as closely in point:

Pennsylvania College Cases, *13 Wall.*, *190*, *pp. 209 to 211*; *212 to 214*; *217 to 221*;
Tomlinson vs. *Jessup*, *15 Wall.*, *454*;
Miller vs. *State*, *15 Wall.*, *478*, *pp. 495 to 499*;
Holyoke Co. vs. *Lyman*, *15 Wall.*, *500*;
Sinking Fund Cases, *99 U. S.*, *700*;
Railway Co. vs. *Philadelphia*, *101 U. S.*, *528*, *pp. 539 and 540*;
Close vs. *Greenwood Cemetery*, *107 U. S.*, *466*;
Spring Valley Water Works vs. *Schottler*, *110 U. S.*, *347*;
Northern Pacific R. R. Co. vs. *Traill County*, *115 U. S.*, *600*;
N. Y. & N. E. R. R. Co. vs. *Bristol*, *151 U. S.*, *556*;
Perrin vs. *Oliver*, *1 Minn.*, *202*;
White vs. *S. & M. R. R. Co.*, *14 Barb.*, *559*;
Hyatt vs. *McMahon*, *25 Barb.*, *457*;
Hyatt vs. *Whipple*, *37 Barb.*, *595*;
Buffalo & N. Y. City R. R. Co. vs. *Dudley*, *14 N. Y.*, *336*;
In the Matter of the Reciprocity Bank, *22 N. Y.*, *9*;
Bailey vs. *Hollister*, *26 N. Y.*, *116*, *117*;
Meadow Dunn Co. vs. *Gray*, *30 Me.*, *547*;
Gardiner vs. *Hope Ins. Co.*, *9 R. I.*, *194*;
West Wis. Ry. Co. vs. *Trempeleau County*, *35 Wis.*, *257*;

Ally. Gen'l vs. *R. R. Cos., 35 Wis., 425, pp. 432, 433, 461, 462; 569 to 579;*
Jeffersonville R. Co. vs. *Gabbert, 25 Ind., 431;*
Union Improvement Co. vs. *Commonwealth, 69 Pa. St., 140.*

The reply made by counsel for plaintiffs in error to the citation of the cases above referred to is that while it may be that under a reservation of the power to "amend *or repeal*" the act of incorporation, the State might have imposed a double liability upon the shareholders of the Minnesota Western Railroad Company, it could not impose such liability under a reservation of the power to "*alter or amend*" which was contained in the Act of 1853. He says the exemption of the shareholders of the Minnesota Western Railroad Company was a corporate franchise; to take this exemption (franchise) away is to repeal the charter *pro tanto;* this can be done only under a reservation of the power to "repeal." Passing for the moment the false assumption that the exemption in question was a corporate franchise, let us inquire whether it is true that to take away this alleged exemption of shareholders by imposing a different (double) liability is a repeal of the company's charter *pro tanto*, in any sense other than that in which every amendment or alteration that is not simply the addition of new matter, is a repeal *pro tanto.* What is meant by to "amend or alter?" "Amend" is defined by the Century Dictionary "properly to improve in expression or detail, but by usage to alter either in construction, purport or principle." "Alter" is defined by the same authority, "to make some change in; make different in some particular; cause to vary in some degree, without an entire change."

In each case the legal sense of the word is identical with that in which it is commonly used. I think it is safe to say that each of these words uniformly conveys the idea of a change, whether by addition, subtraction or substitution, which is not, however, so complete as to make the instrument amended or altered into something essentially new, or as to destroy the instrument altogether. It is evident that this is the meaning attached to the word "amend" by the Supreme Court of Minnesota in such cases as *Ames* vs. *L. S. & M. R. R. Co., 21 Minn., 241,* and *Green* vs. *K. R. F. B. Cor., 35 Minn., 155.*

For a full discussion of this subject, see *Zabriskie* vs. *Hackensack & N. Y. R. Co., 18 N. J. Eq., 178.* In this sense an amendment or alteration of an act dealing with one subject in many details may radically change one detail of the act without changing the purpose or scope or essential effect of the act. Yet, the change, while undoubtedly amounting to a repeal *pro tanto*, is nevertheless an amendment or alteration, and the power to make such change in an act is plainly reserved to the State under a reservation of the power to "amend or alter."

While it is perhaps true that in every one of the cases above cited, the power reserved was that to "amend or repeal," or its equivalent, I believe it will be found in every case, *and that it plainly appears from the context, that it is the power to amend* that had been exercised, that was in question, and upon which the Court relies and upon which it places its decision and not the power to *repeal.* This expressly appears in very many of these decisions. In our case the instrument that was to remain subject to amendment and alteration was the whole charter act. Certainly a change of that act in one particular, by which the shareholders instead of being exempted (if they had been) from all individual liability for the debts of the Minnesota Western Railroad Company, were as to the future, made liable for those debts to a limited extent, falls within the definition of either amendment or alteration.

This conclusion will be borne out by an examination of the following cases, which deal solely with reservations of power such as that which we have under consideration in this case:

State vs. *Granville Alexandrian Soc., 11 Ohio., 1;*
Parker vs. *Metropolitan R. R. Co., 109 Mass., 506;*
Sprigg vs. *Western Telegraph Co., 46 Md., 67.*

The only case cited in the Court below by counsel for plaintiffs in error, in support of an opposite view, that demands any comment is *Ireland* vs. *Turnpike Co., 19 Ohio St., 369,* and a fatal distinction between that case and this is that in the case of the company there under discussion the state possessed no reserve power to amend or alter the constitution of the company.

(*Second.*) Considering it as established, then, that it was competent for the state through the legislature at least, to im-

pose a personal liability for the debts of the company upon shareholders in the Minnesota Western Railroad Company, could this be done by constitutional enactment?

I understand that counsel for plaintiffs in error concede that it may be done in this way.

The reservation contained in the company's charter read:

"The legislature may at any time amend or alter this act."

It is apparent, however, that the word "legislature" was not used in any narrow or technical sense, but to designate the law-making power of the state. Had it been used in any other sense, its reference would have been limited to the legislature *of the Territory of Minnesota* (which derived its authority from the United States), and the power of amendment would have died with the territory. Such an hypothesis is not to be tolerated.

Moreover, a lawful constitutional convention is but a supreme legislature, which, for the time being, supersedes the ordinary legislature. It differs from the ordinary body only in that it does not bear the name "legislature," and that it possesses larger powers, some of which are infrequently exercised. It may, however, and often does legislate upon ordinary matters.

See *Willis* vs. *Mabon*, *48 Minn.*, *140*, *p. 150.*

The legislature, strictly so-called, is but the creature of the constitution, and it would be absurd to say that a power reserved to the legislature could not be exercised by a constitutional convention. What the convention may do by laying its mandate upon the legislature it is creating, it may surely do itself.

Nor do we lack authority to confirm this view. This same question arose in the case of *Oliver Lee & Company's Bank*, *21 N. Y.*, *9.* The Court of Appeals of New York said:

"But it is argued that they (corporate franchises) could not be revoked or altered by a change of the constitution, even if it could be done by the legislature. We have seen that the Supreme Court of the United States has held that a state constitutional provision, acting prejudicially upon a contract, is a law passed by a state impairing its obligation, within the inhibition of the Federal Constitution. This is upon the ground

that the substance of the provision is that the state shall not interfere in any way with the rights which citizens have acquired by contract. It may be said with equal reason, and without any greater departure from the strict meaning of language, that the reservation contained in the laws under which corporations are formed looks to a revocation of the franchises by any legal act which shall possess the force of law, though not strictly an act of legislation."

The question again arose in the case of *The Reciprocity Bank, 22 N. Y., 9*, and was decided in the same way.

(*Third.*) Was the constitutional provision (*Sec. 3, Art. X*) intended to affect shareholders in corporations already existing under special charters that contained no stipulation as to the liability of shareholders?

Such was certainly a part of the *purpose* of the provision. Prior to the adoption of the State Constitution the liabilities of shareholders in corporations, the charters of which were silent upon the subject, had been determined by the general rules of the common law. The purpose of incorporating into the constitution the provision in question was to substitute for the rule of the common law another and different rule, and, naturally, in the absence of any apparent intent to the contrary, it must be presumed that the application of the substituted rule was intended to be at least as broad as had been that of the common law rule.

And certainly the *language* of the provision is broad enough to work this result: "Each stockholder in *any* corporation shall be liable, &c." No distinction is made between corporations formed and those to be formed. Moreover, such a distinction, so far as future debts were concerned, would have been inequitable, and, if unnecessary, unwise. It certainly is not to be presumed to have been intended.

But the meaning of the words "any corporation" is so defined in the constitution itself as to reinforce the conclusion that the words used were intended to possess their natural scope. Sec. 1 of Art. X, of the constitution reads as follows:

"The term 'corporations,' as used in this article, shall be construed to mean *all* associations and joint stock companies, having any of the powers and privileges not possessed by individuals or partnerships, *except such* as embrace banking privileges."

Upon this subject, also the reasoning of the Court of Appeals of New York, in the case of *Oliver Lee & Company's Bank*, *supra*, is helpful and very apposite.

In that case the Court said:

"The first question to be determined relates to the construction of the constitutional provision imposing personal liability upon the stockholders of banks (*Const., Art. 8, Sec. 7*); and the inquiry is whether it is limited to banks thereafter to be created, or applies equally to existing banking corporations. There is nothing in the language which looks to a discrimination between the two classes. It declares generally that the stockholders in every corporation and joint stock association for banking purposes, issuing bank notes, after January 1, 1850, shall be individually responsible, &c. If we look to the apparent object of the provision, no motive can be discovered for confining its operation to future banks. The intention was to protect more adequately the creditors of these institutions, and to take from their proprietors, to a qualified extent, the shield afforded by the corporate personality in which their individual ownership was merged. There were strong reasons for the establishment of a uniform system in this respect, if it could be done without manifest injustice. The existing banks were numerous, and if they were exempted from the principle of personal liability, it would be a long time before it would be generally established. By the general banking law, the associations had the power to prescribe for themselves the duration of their corporate existence, and a long term had generally been named. Hence, if the rule of personal liability only reached the case of future banks, there would continue to be two classes of banking institutions for many years to come. The defendants' counsel insists that we should not construe the clause so as to disturb vested interests unless compelled by language which would not admit of any other meaning. But we are not to interpret the constitution precisely as we would an act of the legislature. The convention was not obliged, like the legislative bodies, to look carefully to the preservation of vested rights. It was competent to deal, subject to ratification by the people and to the constitution of the Federal Government, with all private and social rights, and with all the existing laws and institutions of the state. * * * When, therefore, we are seeking for the true construction of a constitutional provision, we are constantly to bear in mind that its authors were not executing a delegated authority, limited by other constitutional restraints, but are to look upon them as the founders of a state, intent only upon establishing such principles as seemed best calculated to produce good government and promote the public happiness, at the expense of any

and all existing institutions which might stand in their way. * * * When, therefore, we read in the provision under consideration that the stockholders of every banking corporation shall be subject to a certain liability, we are to attribute to the language its natural meaning, without inquiring whether private interests may not be prejudiced by such a sweeping mandate. * * *

See, also,

*In the Matter of the Reciprocity Bank, 22 N. Y., 9; Cooley's Constitutional Limitations (5th Ed.), p. 73, p. *61.*

All the reasoning of the Court of Appeals of New York applies with equal force to the case at bar. To have confined the liability to *future* corporations would, in practical effect, have postponed the realization of any considerable benefit from the provision to a time far removed in the future. Certainly the legislature did not intend such to be the result.

The words of the constitution are entitled to their full significance, and this being granted, they include all corporations then existing or thereafter to exist, under the sanction of the state sovereignty. It would have been inequitable to the shareholders of corporations created after the adoption of the state constitution, as well as to creditors of those previously created, had not the provisions of the constitution been made to apply to all existing corporations to which they could be applied, and to the fullest extent possible.

And see, as bearing decisively on this question, the following cases :

Tomlinson vs. *Jessup, 15 Wall., 454 ;*
Holyoke Co. vs. *Lyman, 15 Wall., 500 ;*
Ry. Co. vs. *Phila., 101 U. S., 528 ;*
Spring Valley Water Wks. vs. *Schottler, 110 U. S., 347 ;*
N. Y. & N. E. R. Co. vs. *Bristol, 151 U. S., 556 ;*
Gardner vs. *Ins. Co., 9 R. I., 194 ;*
Hyatt vs. *McMahon, 25 Barb., 457;*
Union Impt. Co. vs. *Com., 69 Pa. St., 140 ;*
Parker vs. *Metr. R. R. Co., 109 Mass., 506;*
State vs. *G. A. Soc., 11 Ohio, 1 ;*
Jeffersonville R. Co. vs. *Gabbert, 25 Ind., 431 ;*
Sprigg vs. *Western Tel. Co., 46 Md., 68.*

For the rule that general laws, when the intention so to do appears or can be fairly gathered, operate as amendments or modifications of special acts of incorporation,

See

Endlich on the Interpretation of Statutes, Secs. 231 and 232;

2d Morawetz on Corporations, 2d Edition, Sec. 1110;

Bangor, Old Town & Milford Railroad Co. vs. *Smith, 47 Maine, 34;*

Roxbury vs. *The Boston Providence Railroad Cor., 6 Cushing, 424;*

Prince vs. *St. Paul, 19 Minn., 267;*

State vs. *Kline, 22 Minn., 328.*

The two cases upon which counsel for plaintiffs in error mainly relies upon this branch of the case are *Robertson* vs. *Sibley, 10 Minn., 323*, and *St. Paul* vs. *S. P. & S. C. R. R. Co., 23 Minn., 469.*

Robertson vs. *Sibley, 10 Minn., page 323*, was an action by the Sheriff of Ramsey County to reduce to possession certain moneys alleged to be owing as a stock *subscription* to the Minneapolis & Cedar Valley Railroad Company, a judgment debtor, and was brought under the provisions of Subdivision 4, Section 156, of the Public Statutes, Minnesota, page 553, authorizing the levy upon such debts. *It was not contended that the sheriff obtained any right to recover by virtue of the constitutional provisions* or of general laws of the state applicable to corporations or their stock. The charter of the Minneapolis & Cedar Valley Railroad Company was a special act of the territorial legislature passed in 1856, which contained no provision with reference to the liability of shareholders. Sec. 17 of the act declared it to be a public act "and may be amended by any subsequent legislative assembly in any manner not impairing or destroying the vested rights of said corporation, and shall be favorably construed in all legal and equitable proceedings for the accomplishment of the objects intended." The statement in the court's decision, relied upon by defendants' counsel, that since it was incorporated during "our territorial existence" by special act of the legislature, it does not come within the provisions of the state constitution relating to cor-

porations, was entirely unnecessary and absolutely disconnected in any way with the decision of the case. The words were beyond doubt, inconsiderately used. Reference was evidently intended to the fact that it was incompetent for the state, through its constitution, to interfere with vested rights.

In *St. Paul* vs. *The St. Paul & Sioux City R. R. Co., 23 Minn., 469*, the facts were the following:

Lots of the defendant, in the City of St. Paul, were assessed by the municipal officers for the benefits conferred upon them by the grading of a certain street, the assessments being made under the provisions of the municipal charter. Upon non-payment, the city applied for judgment, and a stipulation between the parties was entered into, by which it appeared that the defendant company existed under an act of March 2, 1855, to incorporate the Root River Valley & Southern Minnesota Railroad Company, and other acts; that it had constructed and put into operation, and owned and operated, and for more than seven years had owned and operated, that is to say since a time prior to the adoption of the municipal charter, a continuous line of railroad, more than sixty miles in length, within the State of Minnesota; that the property assessed was in its actual occupation for railroad purposes; that the defendant had fully complied with all the acts constituting its charter. The exemption from taxation, claimed by the defendant, was contained in its original charter act, and in an amendment thereto passed in 1864. The exemption was expressly granted by these acts. No right to amend or repeal the charter was, apparently, reserved. It was held, and properly, that in such a case the provisions of the constitution as to taxation could not apply because the subject was *expressly treated and settled* in a prior contract between the state and the railway company. This case certainly has no pertinence to the subject of present discussion.

It should be noted that there is no question of giving a retroactive effect to the constitutional provision under discussion. I do not claim that the constitution operates, or was intended to operate, upon debts created prior to its adoption, but that it was intended to, and does, operate upon debts thereafter created by every corporation with which any express and inconsistent charter contract did not then exist.

I have, then, I believe, established these propositions:

(1) The state, at the time of the adoption of the state constitution, had power constitutionally to impose a double liability upon the shareholders of the Minnesota Western Railroad Company.

(2) It had the power to do this by an appropriate provision incorporated in the state constitution.

(3) A provision to this effect, applicable to this company as well as to others, was incorporated in that instrument and has always since remained a part of the constitution.

II.

By reason of legislation of the State, accepted by the Minnesota Western Railroad Company, under which that company now exists, if at all, the company became, with its consent and that of all its shareholders, a State corporation and its stock became subject to the double liability imposed by the State constitution upon State corporations.

At the time of the passage of the act authorizing the organization of the Minnesota Western Railroad Company by the territorial legislature, there was no law in force in the territory imposing a double liability upon shareholders in corporations. Consequently, if the Minnesota Western Railroad Company had gone into business immediately after the passage of that act its shareholders would not, up to the time of the adoption of the State constitution, have been individually liable upon their stock.

Counsel for plaintiffs in error contends that the State could not, subsequently to any action by the Minnesota Western Railroad Company that amounted to even the most formal acceptance of its charter, increase the liability of shareholders to creditors, even though the corporation had not in any way, at the time of such action by the State, undertaken the prosecution of the public enterprise for which it had been organized.

The only acceptance shown (and this was not found to be a fact by the court below) was a formal organization of the company in 1857. But assume, for the sake of argument, that plaint-

iffs in error have established a formal acceptance of the Act of 1853 by the corporators named therein, and that the reservation of the right to amend or alter the charter did not authorize an increase of the liability of shareholders. What is the result?

Prior to the actual inception of the *corporate enterprise* of the Minnesota Western Railroad Company, or the contracting of any debts upon its account, or, so far as it appears, the investment of anything in its securities, the company had ceased to have any right to proceed under the authority conferred by the territorial act (its original charter). When it actually began operations—*in fact, when it permanently really organized*—it was under the sanction and by virtue of an enabling act of the *State* sovereignty; that is to say, the Act of 1869. By that act, the charter of the Minnesota Western Railroad Company, *being then subject to forfeiture at the pleasure of the State*, the company was completely reconstituted, given new life and new powers. The original authority of the incorporators of the Minnesota Western Railroad Company was entirely changed. New corporators were added to the original list; different people were authorized to control the matter of stock subscriptions; the route of the proposed road was changed; the conditions precedent to the vesting in the company of the rights granted were entirely altered; and, in order more distinctly to denote the change in the source of the power conferred and to characterize the acts performed by the company as acts performed under the sanction of the State, this act provided that the word "State" should be substituted for the word "Territory" wherever it occurred in the act of incorporation, save in the enacting clause.

While this may not have amounted in legal effect to the creation of a new corporation, the act certainly withdrew from the original incorporators the rights conferred by the Acts of 1853 and 1855, and conferred upon the persons named in those acts, together with others, that is upon a new set of men, some of the rights originally conferred, together with new rights. This Act of 1869 was accepted and acted upon by the Minnesota Western Railroad Company; thereby the right of the old incorporators to object to the changes thus made was waived, and the changes became effectual and binding. *All the subsequent rights and acts of the Minnesota Western Railroad*

Company, as well as all the rights of its shareholders, were and are founded upon this Act of 1869 and the other acts of the state subsequently passed. After the passage of this act it would not have been possible for the persons named as incorporators in the Acts of 1853 and 1855 to proceed alone, or to enjoy any of the rights granted by those acts, except as the same were modified by the conditions prescribed in the Act of 1869 ; in other words, the corporation has actually prosecuted its corporate enterprise solely under the sanction of the laws of the state.

See *Ames* vs. *L. S. & M. R. R. Co., 21 Minn., pp. 289 to 291.*

See, also, for a very lucid discussion of the effect of such a condition :

Shields vs. *Ohio, 95 U. S., 319.*

Now, as we have seen, the *state* could not by its voluntary act either create a corporation, or enable a corporation to exercise its powers and do business without the constitutional liability *ipso facto* attaching to the stock of the corporation. A corporation cannot, I submit, derive its powers and authority from the state without becoming in substance a state corporation and submitting itself to the laws of the state and the obligations thereby imposed. In Minnesota, one of such obligations is, and always has been, the liability of shareholders to respond to creditors in the manner and to the extent prescribed by the constitution.

III.

No rights under the charter of the Minnesota Western Railroad Company became vested in it or its shareholders prior to the adoption of the state constitution and consequently when that company entered upon its business career, the constitutional liability attached to its stockholders.

The Minnesota Western Railroad Company did not enter upon its corporate enterprise prior to the adoption of the state constitution. It was not until after 1869, when the constitution had been in force more than ten years, that, so far as appears, it *received payment* upon any subscriptions to its

stock or contracted any debts. It definitely appears that it was not until after 1869 that it was finally organized or laid out its line of road, or did anything whereby there arose in its shareholders or its creditors any vested interest in the rights granted to it by the legislature. Prior to that time no one had done anything or invested anything upon the strength of that act.

Now, the doctrine that the immunity of the shareholders of a corporation from corporate debts can not be taken away by subsequent legislative enactment is but a branch of the doctrine of vested rights. So long as the rights granted by the legislature to a corporation have not become vested by exercise or by the doing of something toward the accomplishment of the public benefit intended, the act of incorporation remains merely an offer, subject to be withdrawn or altered.

Upon this subject see *Pearsall* vs. *Great Northern Ry. Co.*, *161 U. S., 646* (*pp. 659 to 665; 666 to 671; 672 to 674, and p. 677*), which goes much farther than the doctrine stated.

I think it will be found that in every well considered case sustaining the docrine that a corporate charter (when unilateral) is an irrevocable contract, the charter had been not only accepted but *acted on* in pursuance of the intent of the grant.

By the adoption of the Minnesota Constitution the people of that State enacted that each shareholder in every corporation shall be liable for its debts to the extent of the amount of stock held or owned by him. The provision was self-executing. (See *Willis* vs. *Mabon*, *48 Minn.*, *140*, and *McKusick* vs. *Seymour, Sabin & Co*, *48 Minn.*, *158.*) To this enactment there were no exceptions except in the case of manufacturing and mechanical corporations and such exceptions as were implied by law, *i. e.*, those created by the application of the docrine of vested rights. But, upon the principle above stated, no rights of any description had at that time become vested in the Minnesota Western Railroad Company or in its shareholders. The constitutional provision, therefore, entered into and thenceforth qualified the charter of the railway company, When (about 1870) the company actually entered into business, made investments and built road, every person that invested a dollar in it, or accepted a share of its stock, did so upon the condition that he should be personally

liable for the debts of the company to an amount equal to the par value of his stock.

For a case which in principle is in point, see *Matter of Empire City Bank, 18 N. Y., 199.*

To put the same thing in another way. The Minnesota Western Railroad Company did not act on the offer of the state until after the constitution had intervened. The provisions of that instrument changed the terms of the offer. The company accepted the offer as modified and its shareholders must abide by the contract actually made.

IV.

Even if the Minnesota Western Railroad Company had been organized and had begun business prior to 1858, and no reservation of the right to amend it had been contained in its charter, the adoption of the State Constitution would have operated to impose a double liability upon its shareholders for all debts of the company THEREAFTER CONTRACTED.

The act of incorporation of this company *did not include any express exemption of the shareholders from double liability.* The exemption, if it may be called such, existed merely by reason of the existence of the rule of law that, in the absence of special provision, the shareholders in a corporation are not individually liable for its debts. The act of incorporation contained no guaranty that this immunity would continue. If any person had become a shareholder in the corporation, there being no special provision upon this subject, he would have done so with a knowledge that his rights, as such shareholder, were fixed by the common law of the State; but that this law was subject to change by legislative or constitutional enactment, and that the silence of the act of incorporation was no guaranty upon the part of the legislature that there would not be substituted, at some future time, for the rule of law existing at the time of the passage of the act, some general statutory provision making all shareholders in corporations liable to some extent for the debts *thereafter contracted* by their respective companies. It should follow that even if the act incorporating the Minnesota Western Railroad Company had

not contained a reservation of the right to amend it, it would have been competent for the people, through an amendment of the constitution, to impose upon the shareholders in that corporation (if there had been any), in common with the shareholders in all other Minnesota corporations, a personal liability for the *future* debts of the companies in which they held stock respectively. *A fortiori*, it was competent to impose a liability for future debts upon future shareholders.

Counsel for plaintiffs in error contends that the rule of law existing at the time of the making of a contract enters into it, and quotes cases holding that the statutes regulating redemptions from mortgage foreclosures enter into the mortgage contract. But he forgets that the contract into which the *general* law as to shareholders' liability enters (that is to say, the contract had in view by the general law.) is not that between the corporation and the shareholder or that between the shareholder and the State, but that between the corporation and its creditors. I do not contend that the constitution affects contracts between the corporation and its creditors made prior to the adoption of the constitution, but that, the general rule having been changed, the new rule enters into all subsequent contracts. The shareholders of this company had no contract out of which arose a right to insist that their contracts with creditors of the corporation should for all time be governed by one rule of general law.

See,

Anderson vs. *Cowes. 18 Gratt, 295;*
Stanley vs. *Stanley, 26 Me., p. 196;*
Coffin vs. *Rich, 45 Me., pp. 508-10;*
Hathorn vs. *Calef, 53 Me., 471, pp. 482-4;*
Sleeper vs. *Goodwin, 67 Wis., 577, pp. 580-2; 589.*

There is, of course, no question that the state constitution did change the general rule of law upon the subject of the personal liability of shareholders, and that by its terms no corporation (except manufacturing and mechanical companies), was or is excepted from the operation of the provision. (*Constitution, Art. 10, Secs. 1 and 3.*) Such being the case, it follows that had there been shareholders in the Minnesota Western Railroad Company at the time of the adoption of the constitution, they would thereupon have become subject to a

double liability for all debts of the company thereafter contracted. *A fortiori* the persons who thereafter organized the company and, with the constitution staring them in the face, issued and subscribed for its stock, and those who succeeded them as shareholders, were subject to that liability. Moreover, such a change in the responsibility of shareholders is not such a change in the powers, privileges or franchises of the corporation as would render it incapable, or disable it to prosecute the enterprise for which it had been chartered, and unless a change be thus fundamental, it is competent for the legislature to make it.

See

Pearsall vs. *Great Northern Ry. Co.*, *161 U. S.*, *646.*

It appears, then, that even if it should be determined that the Consolidated Corporation is identical with the Minnesota Western Railroad Company, its shareholders and, therefore, plaintiffs in error, are nevertheless liable to the extent of an amount equal to the par value of the stock held or owned by them for the debts of the Company. It follows that whether this Court agrees or disagrees with the construction placed upon the Act of 1881 by the Supreme Court of Minnesota or with the conclusions drawn by that Court from the results of that construction, the judgment entered below must be affirmed, if the writ of error be not dismissed.

F. W. M. CUTCHEON,
Counsel for Defendant in Error.

APPENDIX A.

SPECIAL LAWS, MINNESOTA, 1869, CHAPTER 117.

An Act to Amend An Act entitled "An Act to Incorporate the Minnesota Western Railroad Company," passed March third, one thousand eight hundred and fifty-three.

Be it enacted by the Legislature of the State of Minnesota:

SECTION 1. That section two of said act is hereby amended so as to read as follows:

SEC. 2. The said corporation is hereby empowered to cause such examination or surveys to be made as shall be necessary to ascertain the most advantageous route whereon to construct a railroad, and shall cause an estimate to be made of the probable cost thereof; and the said corporation is hereby invested with full power and right to construct and run a railroad with one or more tracks from Stillwater, on Lake St. Croix, thence running to the city of St. Anthony, on the Mississippi River, thence across the said last named river, via the City of Minneapolis, to a convenient point of junction with the Minnesota Valley Railroad, or the Hastings and Dakota Railroad, or both, as the said company may select, with a branch to the Red River, via Kandiyohi, to a point to be selected on said river, and also a branch running to a point to be selected on the St. Louis River, if deemed advisable by said company.

SEC. 2. That section four of said act be, and the same is, hereby amended by striking out the following words in the first line, "the above named persons," and inserting in place thereof, Franklin Steele, R. P. Russell, William Holcomb, Frederick Schulenberg.

SEC. 3. That whenever the word "Territory" occurs in said act except in section one, the same be stricken out and the word "State" inserted in lieu thereof.

SEC. 4. The said Minnesota and Western Railroad Company

shall commence the construction of said road within three years from the passage of this act.

SEC. 5. This act shall take effect and be in force from and after its passage.

SEC. 6. Section four of an act entitled an act to amend an act entitled an act to incorporate the Minnesota Western Railroad Company, approved February twenty-sixth, one thousand eight hundred and sixty-five, is hereby repealed.

SEC. 7. That section one of said last named act be amended by adding after F. R. Delano, George Faber and Daniel L. Howe.

Approved March 5, 1869.

APPENDIX B.

Special Laws, Minnesota, 1870, Chapter 57.

An Act to Amend An Act entitled "An Act to Incorporate the Minnesota Western Railroad Company," approved March third, one thousand eight hundred and fifty-three, and the acts amendatory thereof.

Be it enacted by the Legislature of the State of Minnesota:

Section 1. That section one of an act entitled "An act to amend an act entitled an act to incorporate the Minnesota Western Railroad Company, passed March the third, one thousand eight hundred and fifty-three," which was approved March fifth, one thousand eight hundred and sixty-nine, is hereby amended by inserting after the words "may select" the words "and from the point of junction with said first named road to the north line of Iowa."

Sec. 2. Section two of said act approved March fifth, one thousand eight hundred and sixty-nine, is hereby repealed.

Sec. 3. Section thirteen of said act approved March third, one thousand eight hundred and fifty-three, is hereby amended by striking out the word "fifteen" and inserting instead "twenty-five."

Sec. 4. Section fourteen of said act of March third, one thousand eight hundred and fifty-three, is hereby amended so as to read as follows:

(Here follow elaborate provisions with reference to the condemnation of right of way.)

Sec. 5. Section twenty-one of said act, approved March third, one thousand eight hundred and fifty-three, is hereby amended by adding at the end thereof the following words: And said company may by a resolution of its board of directors change the name of said company and adopt any suitable name by which said company shall in future be known, and may designate the name by which any branch line shall be known, to take effect after public notice of such change shall be given for one month in any daily paper published at the city of Minneapolis, but such change of name shall not affect any

rights or liabilities of said company under any former name. And said company shall have power to create and issue in such manner and on such terms as it may deem expedient, one or more classes of preferred stock and special stock, and to make such agreements as it may deem proper with the respective holders thereof, as to the dividends thereon, and the securities for such dividends; and to make such agreements as it may deem proper with the holders of any such special stock for the appropriation of the net earnings of any portion of the railroad which it may construct or otherwise acquire to the payment of dividends on such special stock as may be issued in respect thereto, which appropriation, as made by such agreement, shall be effectual to secure to the said and future holders of such stock, the application of such net earnings as in the said agreement provided against any future act of the company or any of its general liabilities. And the said company may make such agreements as it may deem proper with the holders of any such special stock as to the construction and administration of the portion of said railroad to which said stock may pertain; and for the separate organization of the holders of such special stock for the purpose of that construction and administration, and enabling them or directors chosen by them, separately or in conjunction with the other directors, to exercise in respect to the portion of the road to which such special stock may pertain, all the powers of the company, subject to the provisions of such agreement when made and entered into. *Provided*, That in consideration of an annual payment of a per centum (as provided in this section) by said corporation as aforesaid, the railroad, its appurtenances and appendages and all other property, estate and effects of said corporation, which by the provisions of this act contained, said corporation is to acquire, purchase, hold, possess, enjoy or use for, in or about the construction, equipment, renewal, repair, maintaining or operating its railroad, as also the stock and capital of said company, shall be and hereby are forever exempt from all taxation and from all assessments; and in consideration of the grants made to, and the privileges and franchises conferred upon the company hereby created, and of the exemption contained in this section, the said company shall, during the first three years after thirty miles of said railroad shall be completed and in operation, on or before the

first day of March of each and every year, pay into the treasury of the State, one per cent. of the gross earnings of said railroad, the first payment to be made on the first day of March next after the said railroad shall be completed and in operation, and shall during the seven years next ensuing after the expiration of the three years aforesaid pay into the treasury of this State on or before the first day of March of each and every year, two per cent. on the gross earnings of said railroad, and shall from and after the expiration of ten years from the completion of thirty miles of said railroad, on or before the first day of March of each and every year, pay into the treasury of this State three per cent. of the gross earnings of said railroad; and the payment of such percentum annually as aforesaid, shall be and is in full of all taxation and assessment whatever. And for the purpose of ascertaining the gross earnings aforesaid, an accurate account of such earnings shall be kept by said company, an abstract whereof shall be furnished by said company to the treasurer of this State, on or before the first day of February in each year, the truth of which abstract shall be verified by affidavits of the treasurer and secretary of said company; and for the purpose of ascertaining the truth of such affidavits, and the correctness of such abstract, full power is hereby vested in the Governor of this State, or any other person appointed by law prescribed, to examine under oath, the officers and employees of said company or other persons; and if any person so examined by the Governor or other authorized persons, shall knowingly or wilfully swear falsely concerning the matter aforesaid, every such person is declared to have committed perjury. And for securing to the State the payment of the aforesaid percentum, it is hereby declared that the State shall have a lien upon the railroad of said company, and upon all the property, estate and effects of said company whatever, real, personal or mixed, and the lien hereby secured to the State, shall take and have precedence of all demands, decrees and judgments against said company.

SEC. 6. Section twenty-two of said act, approved March third, one thousand eight hundred and fifty-three, is hereby repealed. *Provided*, that the said company shall carry, and the rights and privileges hereby granted are upon the express condition that the said company shall always carry freight and

passengers over their main road and branches at just and reasonable rates.

SEC. 7. This act shall effect and be in force from and after its passage.

Approved, February 4, 1870.

MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY *v.* GARDNER.

ERROR TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

No. 160. Submitted March 5, 1900. — Decided April 9, 1900.

There is no substantial difference between the Federal question in this case raised in the Supreme Court of Minnesota, and that raised in it here.

The act of Minnesota of March 2, 1881, c. 113, authorizing the consolidation of several railroad companies created a new corporation, upon which it conferred the franchises, exemptions and immunities of the constituent companies; but that did not include an exemption of stockholders in the old companies from the payment of corporate debts, or their liability to pay them.

In a State having a constitutional provision imposing liability on stockholders, if the legislature intended those of a new corporation created by it should be exempt, it would express the intention directly, and not commit it to disputable inference from provisions which apply by name to the corporation.

On the merits, this case presents the question of the liability of the individual plaintiffs in error upon a judgment which was recovered by one Revilo F. Parshall against the Minneapolis and St. Paul Railway Company, and assigned to the defendant in error.

A motion, however, is made to dismiss, on the ground that this court has no jurisdiction.

The Minnesota Western Railway was incorporated by the Territory of Minnesota, by an act of its legislature, approved March 3, 1853. The usual powers of a corporation were conferred, and the company was authorized to construct a railroad from and to certain points in the Territory.

Power was reserved to alter or amend the act. There was no provision fixing the liability of stockholders. The act was several times amended changing the route of the road in some particulars.

In 1858 the State of Minnesota was admitted into the Union, and its constitution contained the following provision: "Each

stockholder in any corporation shall be liable to the amount of stock held or owned by him." Art. 10, sec. 3.

It was amended in 1872 so as to except the stockholders of corporations organized for carrying on any kind of manufacturing or mechanical business.

On February 4, 1870, the provision of the act of 1853, reserving the right to alter or amend the act was repealed.

After the passage of the act of 1870 the company changed its name to the Minneapolis and St. Louis Railway Company.

No steps were taken towards construction or acquiring any line of railroad until 1869. The actual construction was commenced during the fall of 1870, since which time the said company or the consolidated company, hereafter mentioned, has operated and maintained a line of railway in the State.

By an act approved March 2, 1881, in addition to other powers conferred, the Minneapolis and St. Louis Railway Company, and any other railway companies in the construction of whose lines it has aided, or whose lines were at the time held under lease by it, were authorized to consolidate. The act provided for the manner of consolidation, the name of the new corporation which might be "the name of either corporation party thereto or any other name"—the transfer of the properties of the old corporations, the retirement of their stock and the issue of new, and defined the purposes and powers of the new corporation. It is inserted in the margin.[1]

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[1] Chapter 113, Special Laws 1881, p. 651.

An act to amend an act entitled An act to amend an act entitled An act to incorporate the Minnesota Western Railroad Company, approved March third (3d,) one thousand eight hundred and fifty-three, (1853,) and the acts amendatory thereof, approved February fourth, one thousand eight hundred and seventy (1870).

Be it enacted by the Legislature of the State of Minnesota: SECTION 1. That the act entitled An act to amend an act entitled An act to incorporate the Minnesota Western Railroad Company, approved March third (3d), one thousand eight hundred and fifty-three (1853), and the acts amendatory thereof, approved February fourth (4th), one thousand eight hundred and seventy (1870), be amended by adding thereto the following sections, to wit:

SECTION EIGHT. The Minneapolis and St. Louis Railway Company, formerly known as the Minnesota Western Railroad Company, in addition

Statement of the Case.

The consolidation was made as provided in the act by agreement between the Minneapolis Railway Company, the Minne-

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to the powers already conferred upon it by the laws of the Territory of Minnesota and of the State of Minnesota, is hereby authorized to make or acquire, from time to time, any extension of the lines of railway now owned and operated by it, or of those hereafter constructed and operated by it according to law, into the States of Iowa, Missouri, Kansas, Nebraska and Wisconsin, and into the Territory of Dakota, or into one or more of the same. *Provided*, That authority shall exist or be given in or by the States or Territory into which its lines are so extended, to make or acquire and maintain such extensions.

SECTION NINE (9). The said Minneapolis and St. Louis Railway Company shall have power to acquire, from time to time, by lease or purchase, or exchange of stock or otherwise, any other railroad or railroads, whether within or without this State, whose lines connect with its own lines as they now exist or as they shall be extended, either directly or by means of intervening lines. Such acquisition shall be made upon such terms as shall be agreed upon by a contract in writing between the respective corporations. But the same shall not be consummated until first approved by two-thirds in amount of the stockholders of each such corporation, either given at a regular or called meeting of such stockholders, or by a consent expressed in writing. In either case a copy of such contract, together with the evidence of such consent of the stockholders, shall be filed in the office of the secretary of State.

SECTION TEN (10). It shall and may be lawful for the said Minneapolis and St. Louis Railway Company to merge and consolidate its capital, franchises and property with the capital stock, franchises and property of any other railroad company or companies organized under the laws of this State or under the laws of any other State or Territory of the United States, in the construction of whose lines the said Minneapolis and St. Louis Railway Company shall have aided, or whose lines of railway are or shall, at the time of such consolidation, be held under lease by the said Minneapolis and St. Louis Railway Company; *Provided*, That the lines of railway of the companies or corporations so consolidating shall form a continuous line of railway with each other, or by means of any intervening railway, bridge or ferry. But no such consolidation shall be made by the said company with any other railroad corporation, or the lessees, purchaser or manager of any railroad corporation owning or controlling a parallel or competing line.

Such consolidations shall be made under the conditions, provisions and restrictions and with the powers hereinafter mentioned and contained, that is to say:

First (1st). The directors of the company proposing to consolidate may enter into a joint agreement, under the corporate seal of each company, for the consolidation of said companies and railroads, which agreement shall prescribe the terms and conditions thereof, and the mode of carrying the

apolis and Duluth Railroad Company, the Minnesota and Iowa Railroad Company, and the Fort Dodge and Fort Ridgely

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same into effect; the name of the new corporation, which may be the name of either corporation party thereto, or any other name; the number, names and places of residence of the directors and other officers thereof, who shall be the directors and officers thereof for the first (1st) year. The amount of the capital stock of the new company, which shall not exceed the amount of twenty million (20,000,000) dollars, the number of shares into which such capital stock is to be divided (which stock may be divided into classes, with such preferences in respect to any of the classes as may be agreed upon), the amount or par value of each share; the manner of converting or exchanging the capital stock of each of the said companies so consolidating into or for that of the new corporation and the terms of such conversion, the manner of compensating stockholders in each of the old corporations who decline to convert their stock into the stock of the new corporation; and how and when directors and officers shall be chosen, with such other details as they shall deem necessary to perfect such new organization and the consolidation of such companies or railroads.

Second (2d). Such agreement of the directors shall not be deemed to be the agreement of the said old corporations until after it has been submitted to the stockholders of each of the said corporations, separately, at a meeting thereof, to be called upon a notice of at least thirty (30) days, specifying the time and place of such meeting and the object thereof, to be addressed to each of such stockholders when their place of residence is known, and deposited in the post office, and published at least three (3) successive weeks in one newspaper in each of the cities, counties or towns in which the said corporations have their principal office or business, and is sanctioned by such stockholders by a vote of at least two-thirds in amount of the stockholders present at such meeting, either in person or by proxy, each share of the capital stock being entitled to one vote; and when such agreement of the directors is so sanctioned by each of the meetings of the stockholders, separately, it shall be deemed the agreement of the said old corporations.

Third (3d). If the holder of any stock in either of the corporations existing under the laws of this State and so consolidated at the time of making such consolidation, shall be dissatisfied with the same, the consolidated company shall pay to such dissatisfied stockholder or stockholders the full actual value of his or their stock immediately prior to such consolidation, which value shall be assessed and fixed by three disinterested commissioners, appointed for that purpose by the Supreme Court of this State, upon the application of either party, made upon twenty (20) days' notice, but the said company shall not be compelled to pay for the stocks of such dissatisfied stockholder or stockholders unless he or they shall give written notice of such dissatisfaction to the president, secretary or treasurer of the company whose stock shall be held by him or them, within three (3) months after

Railroad Company, and articles of incorporation were duly filed in pursuance of the act.

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such consolidation shall have been consented to by the requisite number of stockholders.

SECTION ELEVEN (11). Upon the approval of such agreement and act of consolidation as hereinbefore provided, and upon the filing of the same or a copy thereof, in the office of the secretary of State, the said corporations, parties thereto, shall be deemed and taken to be one corporation, by the name provided in the said agreement and act, and the stock of the new corporation issued under the terms of such agreement and act of consolidation in exchange for the stock of the former companies, shall be deemed and taken as lawful stock, and subject only to such further payments, calls or assessments, if any, as may be mentioned in the said consolidation agreement, and such new corporation shall possess all the powers, rights and franchises conferred upon each of its constituent corporations, and shall be subject to all the restrictions and duties imposed by the laws of the State.

SECTION TWELVE (12). Upon the consummation of said act of consolidation as aforesaid, all and singular the rights, privileges, exemptions and franchises of each of said corporations parties to the same, and all the property, real, personal and mixed, and all the debts due on whatever account to either of said corporations, as well as all the stock, subscriptions and other things in action belonging to either of said corporations, shall be taken and deemed to be transferred to, and vested in such new corporation without further act or deed, and all claims, demands, property, rights of way, and every other interest shall be as effectually the property of the new corporation as they were of the former corporations parties to the said agreement and act, and the title to all real estate, taken by deed or otherwise under the laws of this State, vested in either of said corporations, parties to said agreement and act, shall not be deemed to revert or be in any way impaired by reason of this act, or anything done by virtue thereof, but shall be vested in the new corporation by virtue of such act of consolidation.

SECTION THIRTEEN (13). The rights of all creditors of and all the holders of liens upon the property of either of said corporations parties to said agreement and act, shall remain and be preserved unimpaired, and shall be assumed and borne by the new corporation, and the respective corporations shall be deemed to continue in existence so far as necessary to preserve the same, and all debts and liabilities incurred by either of said corporations shall thenceforth attach to such new corporation and be enforced against it and its property to the same extent as if said debts or liabilities had been originally incurred or contracted by it. No suit or action or other proceeding now pending before any court or tribunal in which either of said railroad companies is a party, shall be deemed to have abated or been discontinued by the agreement and act of consolidation as aforesaid, but the same may be conducted in the name of the existing corporation to final judgment, or

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The consolidated company thereafter entered upon and until the 2d of November, 1894, enjoyed the franchises, rights, property and earnings of the constituent corporations.

The Minneapolis and Duluth Railroad Company was a Minnesota corporation, and the Fort Dodge and Fort Ridgely Railroad Company and the Minnesota and Iowa Southern Railroad Company were Iowa corporations; and the laws of the State of Iowa authorized the incorporators of railroad companies to exempt themselves from personal liability for the corporate debts, by embodying in the articles of incorporation an article or provision declaring the exemption. This was done.

On and prior to June 28, 1888, the Minneapolis and St. Louis Railway Company executed three mortgages, one of which was to the Central Trust Company of New York, dated June 1, 1881, to secure outstanding bonds of the aggregate par value of $1,382,000, together with interest thereon, at the rate of six per cent. per annum.

This mortgage was duly foreclosed, and the railroad properties, rights and franchises covered by it duly sold, and the title confirmed by final decree to the assignee of the purchaser.

The defendant in error was a judgment creditor of the Consolidated Company, being assignee of a judgment recovered by

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such new corporation may be, by order of the court, on motion, substituted as a party; suits may be brought and maintained against such new corporation for all causes of action in the same manner as against other railroad corporations in this State.

SECTION FOURTEEN (14). All the provisions of the general laws of this State, in regard to railroad corporations, shall be applicable to any new corporations formed by consolidation under the provisions of this act, except so far as the same shall not be applicable thereto by reason of the situation of portions of its line without this State. *Provided*, that, nevertheless, the privileges, franchises, exemptions, immunities, hitherto granted to the Minneapolis and St. Louis Railway Company shall continue to and be vested in such new corporation with the same effect as if originally granted thereto, and that such new corporation may at any time hereafter be consolidated with any other railroad company or companies in the same manner and with the same effect as is by this act provided.

SECTION TWO. This act shall take effect and be in force from and after its passage.

Approved this second day of March, A. D. 1881.

R. F. Parshall, in the Circuit Court of the United States for the District of Minnesota, for personal injuries received by him from the railway company.

The individual plaintiffs in error were shareholders of that company, and each acquired his stock between November, 1884, and the date of the commencement of this suit, but was not a shareholder of either of the companies which formed the Consolidated Company.

The answer of the individual defendants denied liability under the constitution and laws of the State of Minnesota, alleged the incorporation of the Minneapolis and St. Louis Railway Company prior to the adoption of the constitution and statutes, and that it was incorporated in the year 1853, under and pursuant to the provisions of chapter 66 of the Special Laws enacted by the legislature of the Territory of Minnesota, under and by the name of the Minnesota Western Railroad Company, which name was subsequently changed to the Minneapolis and St. Louis Railway Company, substantially as set forth in the first division of the complaint; that the liability of the stockholders of said Minnesota and St. Louis Railway Company was fixed by said act of incorporation, and not otherwise; and that the constitutional provision and laws referred to in the complaint are not applicable to or binding upon these defendants in that behalf.

The trial court rendered judgment for the defendant in error, which was affirmed by the Supreme Court of the State, 73 Minnesota, 517, and this writ of error was sued out.

On the appeal to the Supreme Court of the State it was assigned as error, among others, that the trial court erred in holding that the state constitution if applied to the defendant railway company did not violate section 10, article 1, of the Constitution of the United States in that the provisions of section 3, article 10, impaired the obligation of the charter contract contained in chapter 66, Laws of 1853, Territory of Minnesota. Also in holding that the constitutional provision of the State, if applied to defendant in error, is not in violation of the Fourteenth Amendment of the Constitution of the United States, in that the State by and through the provisions of section 3, article 10, as-

sumed to impair and destroy rights theretofore vested in the defendants (plaintiffs in error).

Also in holding that the defendant railway company was not created until the passage of the act of 1881, that the legislature intended by the act to create or did in fact create a new corporation, or intended to or did abridge or modify the rights, privileges or immunities theretofore possessed by the Minneapolis and St. Louis Railway Company; or if a new corporate entity was created that it did not possess such rights, privileges and immunities, including the exemption from double liability upon its stock created by the act of 1853, and also possessed by the other constituent corporations of the consolidation.

The assignments of error in this court claim that the Supreme Court of the State held, and erred in holding, the constitutional provision imposing liability on stockholders valid against plaintiffs in error, and not to be in violation of the contract created by the act of 1853, the benefits of which act were vested, continued and perpetuated in the plaintiffs in error by the act of 1881, and not to be in violation of that provision of the Constitution of the United States, which prohibits any State from impairing the obligations of a contract, and not in violation of the Fourteenth Amendment of the Constitution of the United States, in that it assumes to impair and destroy rights vested by the act of 1853 and the act of 1881.

It is also claimed that the court held, and erred in holding, that the constitution of the State if enforced against plaintiffs in error was not in violation of section 10, article 1, of the Constitution of the United States, and did not impair the obligations of the contract between the State and plaintiffs in error, embodied in the act of 1881.

Also that the consolidation of the several railroad corporations pursuant to the act of 1881 created a new corporation.

Mr. William Strauss for plaintiffs in error. *Mr. Albert E. Clarke*, *Mr. W. W. Dudley* and *Mr. L. T. Michener* were on his brief.

Mr. F. W. M. Cutcheon for defendant in error.

Opinion of the Court.

MR. JUSTICE MCKENNA, after making the foregoing statement, delivered the opinion of the court.

To sustain the motion to dismiss for want of jurisdiction, the defendant in error contends that the Federal question raised here was not that raised in the court below, and therefore cannot be entertained, and that besides there was a question not Federal decided by the court sufficient to support its judgment.

(1.) No right under the Constitution of the United States was claimed in the answer. But the protection of section 10, article 1, and the Fourteenth Amendment of that instrument, was invoked in the assignment of errors on appeal to the Supreme Court and urged upon its consideration. It is true they claimed the law of 1853 as the contract and not explicitly that of 1881. But they also claimed that the act of 1881 did not create a new corporation, and whether it did or not, that the act continued the immunity from liability for the corporate debts to the stock and stockholders of the consolidated corporation. We think this makes substantial identity between the Federal question in the Supreme Court of the State and in this court.

(2.) But it is said the state court did not decide the Federal question, but decided that the act of 1881 created a new corporation, which became subject to the constitutional provision imposing liability upon stockholders for corporate debts, and that the court rested its judgment on that construction. The court said: "Whatever may be the liability of the several (constituent) corporations we need not inquire, because the liability here sought to be enforced is one against individuals who have been and are stockholders in the new corporation." And again: "Other questions have been raised and discussed by the respective counsel, but a decision upon them by this court in this action is entirely unnecessary, and we express no opinion thereon." This was in effect to deny the existence of the contract claimed by plaintiffs in error. But it is the duty of this court to decide for itself the fact of contract and its impairment, and the motion to dismiss must, therefore, be denied.

The territorial act of 1853 by which the Minnesota Western Railroad was incorporated is claimed primarily to be the contract which is impaired. It gave immunity to the stockholders of that company from liability for the corporate debts, or rather did not impose such liability. It is claimed that the constitution of the State of 1858 violated this contract. It imposes liability upon each shareholder of any corporation to the amount of stock held or owned by him. It is self-executing. *Willis* v. *Mabon*, 48 Minnesota, 140.

The act of 1881 is also claimed as a contract which became binding on the State by the acceptance of its provisions by the several railroad companies, and is impaired by the application of the constitution of the State.

If the Minnesota Western Railroad or its stockholders, or any of the other railroad companies or their stockholders, were parties to this suit, the questions presented would be simpler. But neither of the companies is party to the suit nor are the stockholders parties. Their rights are asserted to be transferred to the plaintiffs in error by virtue of the act of 1881.

The argument is that prior to the adoption of the state constitution the stockholders of the original corporation created by the act of 1853 were exempt from personal liability for corporate indebtedness; that prior to consolidation, under the act of 1881, the stockholders of the constituent companies were also exempt. It is hence contended that it is immaterial whether the Minneapolis Railroad Company is the original of that name chartered by the act of 1853, or a new corporation created by the consolidation. If it is identical, it is argued, with the original company its stockholders are exempt, because its charter contract is older than the constitution of the State. If it is a new company its stockholders are nevertheless exempt, because it is the settled law in Minnesota that its legislature may transmit *existing* franchises, immunities and exemptions vested in one corporation to a *new corporation*, although it could not grant new franchises of the same class to such corporation. And that the legislature has exercised this power and specifically vested in the consolidated company, *first*, all the franchises, privileges and immunities of each of the constituent companies,

and, *second*, the particular privileges, exemptions and immunities granted to the Minnesota Western Railroad Company.

We think that there is no doubt whatever that the act of 1881 created a new corporation. It is so designated, not only expressly but by distinction from the old corporations. The original Minneapolis and St. Louis Railway Company was given power (section 9) to acquire by lease or purchase other railroad lines or consolidate with certain other railroads. (Section 10.) It chose the latter, and the conditions of the consolidation are prescribed. The consolidation is to be accomplished by an agreement of the directors of the companies proposing to consolidate, and the agreement is to provide the terms and mode of carrying the same into effect, the name of "the *new* corporation, which may be the name of either corporation party thereto, or any other name," the number, names and residences of the directors and other officers, the amount of capital stock and the number of shares into which it is to be divided, and the classes and par value, the manner of converting the stock of the consolidating companies into that of the *new* corporation, and the manner of compensating the stockholders of the *old* corporations who declined to convert their stock into the stock of the *new* corporation, and many other details.

Section 11 is as follows:

"Upon the approval of such agreement and act of consolidation, as hereinbefore provided, and upon the filing of the same, or a copy thereof, in the office of the secretary of State, the said corporations, parties thereto, shall be deemed and taken to be one corporation, by the name provided in the said agreement and act, and the stock of the new corporation issued under the terms of such agreement and act of consolidation in exchange for the stock of the former companies, shall be deemed and taken as lawful stock, and subject only to such further payments, calls or assessments, if any, as may be mentioned in the said consolidation agreement, and such new corporation shall possess all the powers, rights and franchises conferred upon each of its constituent corporations, and shall be subject to all the restrictions and duties imposed by the laws of the State."

There can be no doubt, therefore, that a new corporation

was created with new stockholders, and the case is brought in close similarity to *Shields* v. *Ohio*, 95 U. S. 319. In that case as in this there was a consolidation of railroad companies, and it was held a new corporation was formed. In that case as in this one of the companies claimed a special right under its charter (the right to charge such tolls as it might deem "reasonable,") and its transmission to the new corporation by the provision of the act authorizing consolidation, which declared: "And such new corporation shall possess all the powers, rights and franchises conferred upon such two or more corporations by the several acts incorporating the same, or relating thereto respectively, and shall be subject to all the duties imposed by such acts, so far as the same may be consistent with the provisions of this act."

The claim was rejected. Mr. Justice Swayne, speaking for the court, said:

"The legislature had provided for the consolidation. In each case before it took place the original companies existed, and were independent of each other. It could not occur without their consent. The consolidated company had then no existence. It could have none while the original corporation subsisted. All the old and the new could not co-exist. It was a condition precedent to the existence of the new corporation that the old ones should first surrender their vitality and submit to dissolution. That being done, *eo instanti* the new corporation came into existence. But the franchise alone to be a corporation would have been unavailing for the purposes in view.

"There is a material difference between such an artificial creation and a natural person. The latter can do anything not forbidden by law. The former can do only what is authorized by its charter. *Railroad Company* v. *Harris*, 12 Wall. 65. It was, therefore, indispensable that other powers and franchises should be given. This was carefully provided for. The new organization took the powers and faculties designated in advance in the acts authorizing the consolidation—no more and no less. It did not acquire anything by mere transmission. It took everything by creation and grant. The language was

brief, and it was made operative by reference. But this did not affect the legal result. A deed *inter partes* may be made as effectual by referring to a description elsewhere as by reciting it in full in the present instrument. The consequence is the same in both cases."

In the case at bar, however, the grant to the new corporation is claimed to be not only of the franchises of the constituent companies, but of their "exemptions"—not only of the franchises of the original Minnesota and St. Louis Railway Company, but of its "exemptions and immunities." But what franchises, exemptions and immunities? The designation is definite —those of "each of said corporations," those "hitherto granted to the Minneapolis and St. Louis Railway Company"—not those of or those granted to the stockholders of either company. And the distinction must be observed—the distinction between a corporation and its stockholders. It is made in many cases. This court has recognized it for the purposes of taxation. To judge of the intention of the legislature, whether it is in accordance with or against the policy and provisions of the constitution of the State, the distinction ought to be recognized. The exemption of stockholders from the payment of corporate debts or their liability to pay them, (individual liability,) is the concern of the stockholders and the corporate creditors.

We do not mean to say that such an exemption may not be secured by the charter of a corporation and protected to its stockholders by the Constitution of the United States from impairment by subsequent state legislation. But we do mean to say that in a State having a constitutional provision imposing liability on stockholders, if the legislature intended that those of a new corporation created by it should be exempt it would express the intention directly, and not commit it to disputable inference from provisions which apply by name to the corporation.

The question is as to the intention of the legislature, and in ascertaining that intention it must be remembered that the act of 1853 did not grant immunity to the stockholders of the Minnesota Western Railroad from liability. The immunity resulted because liability was not imposed, and this legal right of

the stockholders of that corporation, we do not think, can be said to have been transmitted to the stockholders of the new corporation created by the act of 1881 by the grant to it of the "immunities heretofore granted to the Minneapolis and St. Louis Railway Company."

Besides, the grant of power to the new corporation had adequate purpose. As was said in *Shields* v. *Ohio*, *supra*, powers and faculties were necessary to be bestowed upon the new organization, and this could be done directly, as it was to a great extent, or by reference, and would be supposed to be done in subordination to constitutional restrictions. Nor does the provision of section 14, which makes the new corporation subject to the general laws of the State, except as to the privileges, franchises, exemptions and immunities hitherto granted to the Minnesota and St. Louis Railway Company, conflict with the supposition. That provision had its explanation in the previous laws applying to that company. After its incorporation in 1853 the Minnesota Western did nothing, and nothing was done in pursuance of the purpose of its incorporation until after the act of 1870, authorizing a change of its name to the Minnesota and St. Louis Railway Company. That act gave it new powers, authorized the creation and issuance of different classes of stock, and provided a means of taxation, and exempted it from all other taxation. But it is not necessary to extend the discussion farther.

We have not deemed it necessary to consider the effect of the constitutional provision as an amendment to the act of 1853, or the power of the legislature to pass the act of 1881 if it could be construed as contended for by plaintiffs in error. We construe it differently, and determine against their contention. In other words, we hold that the legislature did not intend by the act of 1881 to give immunity to the stockholders of the new corporation from the liability imposed by the constitution of the State.

Judgment affirmed.